SUPREME COURT, U.S.
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No. 99-____

IN THE

Supreme Court of the United States

RHODA OKUNIEFF,

Petitioner,

—against—

ANNE SKOMOROSSKY, M.D., personally, LORRAINE INNES, M.D., personally, STAN ARCOW, M.D., personally, ELIZABETH MIRABELLO, M.D., personally, JANE DOE, personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER, HERBERT PARDES, in his official capacity of head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

WILLIAM M. BROOKS
(*Counsel of Record*)
Mental Disability Law Clinic
Attorney for Petitioner
Touro Law Center
300 Nassau Road
Huntington, New York 11743
(516) 421-2244 ext. 331

6 pp

QUESTION PRESENTED

Does the involuntary hospitalization of an allegedly mentally ill person by physicians at a private hospital pursuant to the New York Mental Hygiene Law constitute state action that imposes constitutional restraints upon the physicians' actions when the only authority for confining the individual is the State's civil commitment laws?

LIST OF PARTIES

The names of the parties in the proceeding in the court whose judgment is sought to be reviewed are as follows:

Plaintiff-Appellant

Rhoda Okunieff

Defendants-Appellees

R. Rosenberg, M.D.

Anne Skomorossky, M.D.

Lorraine Innes, M.D.

Stan Arcow, M.D.

Elizabeth Mirabello, M.D.

Jane Doe

Columbia Presbyterian Medical Center

Herbert Pardes, in his official capacity of head of the Department of Psychiatry of Columbia Presbyterian Medical Center.

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ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

Petitioner Rhoda Okunieff respectfully requests that a writ of *certiorari* issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Second Circuit on January 29, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 166 F. 3d 507 and is set forth in the Appendix to this Petition at 1a-3a.

The opinion of the United States District Court is reported at 996 F. Supp. 343 and is set forth in the Appendix to this Petition at 4a-31a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered an opinion that affirmed the judgment of the District Court on January 29, 1998. The Court of Appeals denied a motion for a rehearing on May 14, 1999. This petition for a writ of *certiorari* is taken pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves an interpretation of the Fourteenth Amendment to the United States Constitution. It also involves the application of New York Mental Hygiene Law §§ 9.03 and 9.27. Also relevant to this appeal is New York Mental Hygiene Law §§ 31.02 (a)(2) and 31.04(a)(4). These provisions are set forth in the Appendix to this Petition at 32a-35a.

STATEMENT OF THE CASE

This case involves one of the most fundamental aspects of the United States Constitution—the right of citizens to be protected by the Due Process Clause when they are deprived of physical liberty as a result of the exercise of sovereign authority that has been delegated by the government to private parties. Specifically, the State of New York not only authorizes, but requires, private hospitals to exercise the

State's police and *parens patriae* powers to civilly commit individuals deemed mentally ill and dangerous.[1] At issue in this case is whether the Constitution protects individuals who have been civilly committed as a result of this delegation of state authority.

Rhoda Okunieff went to a physician for an unrelated medical problem and found herself involuntarily transported to a psychiatric emergency room even though she was not acting dangerously or threatening harm. JA-398-404.[2] She remained involuntarily in the emergency room for two days before she met with two physicians who then executed certificates for involuntary hospitalization after examining her for only ten to fifteen minutes. JA-404-405. Under New York law, a third physician was required to confirm the need for hospitalization. A physician did so without examining her, and Ms. Okunieff was involuntarily hospitalized and remained confined for thirteen days. JA-404-405. When Ms. Okunieff went to New York State Supreme Court to challenge her confinement, as she was entitled under New York law, the judge recognized that Ms. Okunieff did not satisfy the criteria for involuntary hospitalization and ordered the hospital to release her. *Id.*[3]

Proceedings Below

Ms. Okunieff filed a § 1983 lawsuit in the United States District Court for the Southern District of New York. She named as defendants the physicians who effected her involuntary hospitalization under New York law as well as the

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[1] For a detailed explanation of the State's statutory scheme that requires private participation in the State's civil commitment process, *see infra* at 8-9.

[2] References preceded by "J.A." are to the Joint Appendix filed in the Second Circuit.

[3] In New York, Supreme Court is the court of original jurisdiction and not an appellate court. *See* N.Y. Const. Art 6, § 7 (McKinney 1987).

physician who, without state authority, facilitated the petitioner's involuntary transport to the hospital psychiatric emergency room. The petitioner alleged that the defendants violated her due process rights when they confined her even though she did not pose a danger to herself or others. She sought damages for the allegedly unconstitutional confinement.

The district court granted summary judgment to the physicians on the ground that the civil commitment of the patient did not constitute state action. The court first held that civil commitment does not satisfy the state compulsion test for state action because the state does not compel civil commitments. 13a. In reaching this decision, the court concluded that, notwithstanding the existence of legal standards governing the petitioner's confinement under the Mental Hygiene Law, when determining whether or not to commit, physicians employ medical judgments based upon standards in the medical community. 14a, 18a. The court noted further that the New York Mental Hygiene Law does not "define the standards that a physician must apply when deciding the fate of one facing involuntary commitment." 16a.

The district court then held that civil commitment does not satisfy the close nexus/joint action test because the patient's hospitalization did not involve a situation in which the state was a joint participant in the challenged action. 19a. The court further held that civil commitment does not satisfy the public function test because the committing physicians do not exercise powers that were traditionally the exclusive prerogative of the State, since historically, patients were committed to private asylums. 27a. The court equated civil commitment to a citizen's arrest, the repossession of chattels, and the ejection of trespassers. 28a.

Finally, the district court concluded that civil commitment does not constitute the exercise of State authority. In so holding, the court noted that "the authority which private physi-

cians and private hospitals use to commit an individual is the professional medical standard of the community where the physicians' medical judgments are based." 24a.

Without additional elaboration, the Court of Appeals for the Second Circuit affirmed for "substantially" the reasons set forth in the district court's opinion. 3a.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW THREATENS TO DEPRIVE MENTALLY ILL INDIVIDUALS OF DUE PROCESS RIGHTS BY PERMITTING STATES TO DELEGATE THE POWER OF CIVIL COMMITMENT TO PRIVATE DOCTORS AND HOSPITALS WITHOUT CONSTITUTIONAL SAFEGUARDS.

"This Court has repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas,* 441 U.S. 418, 425 (1979). Civil commitment constitutes the legitimate exercise of a state's *parens patriae* power to provide care to its citizens who cannot care for themselves, and its police power to protect the community from dangerous tendencies of those who suffer from mental illness. *Id.* at 426. Accordingly, this Court has recognized that the Constitution imposes limitations on a state's authority to confine an allegedly mentally ill individual. *See O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975) (a state may not involuntarily hospitalize mentally ill person who can survive safely in freedom); *Addington v. Texas,* 441 U.S. at 431-32 (due process requires that state establish by clear and convincing evidence that civil committee suffers from mental illness and poses a danger to herself or others).

A holding that civil commitment does not constitute state action enables allegedly mentally ill individuals to be hospitalized without due process protection. Moreover, the

decision below eliminates other constitutional protections afforded to civilly committed individuals.

The Constitution governs the treatment of a mentally ill person who is hospitalized. *See Mills v. Rogers*, 457 U.S. 291, 299-300 (1982) (right to refuse drugs); *Youngberg v. Romeo*, 457 U.S. 307, 319, 323 (1982) (right to safety, freedom from undue restraint, and treatment that does not substantially depart from accepted professional standards). However, psychiatric hospitals are often inherently coercive environments in which staff members subject patients to abuse, restraints and forced drugging. *See, e.g.*, Timmons, Note. *Crisis in the Mental Health Care Industry: An Analysis of the Practices of Private For-Profit Psychiatric Hospitals and the Governmental Response*, 31 Houston L. Rev. 323, 335 (1994); Petrila, *Ethics, Money and the Problem of Coercian in Managed Behavioral Health Care*, 40 St. Louis U.L.J. 359, 359-60, n.4 (1996).[4] Under the decision of the Second Circuit, the Constitution would not govern any actions of private hospitals or private physicians that harm an individual's interest in bodily autonomy and patients would have no recourse under the Constitution for conduct that violates constitutional standards.

Moreover, involuntarily hospitalized patients would not be assured of having adequate procedural protections to challenge any wrongful confinement. It is well-settled that when the government civilly commits a mentally ill individual, due process requires numerous procedural protections such as the

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[4] A statement by a leading psychiatrist illustrates the potential for abuse in psychiatric facilities: "No matter what the law does, we'll always [d]rug all the people we want. I hate to say that, but that's my experience. By hook or by crook, most patients will continue to be [drugged].' " Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 La. L. Rev. 283, 387 (1992) (quoting Dr. Loren Roth in *Conference Report, Refusing Treatment in Mental Health Institutions: Values in Conflict*, 32 Hosp. & Community Psychiatry 255, 257 (1981)).

right to counsel, *see, e.g. Heryford v. Parker*, 396 F. 2d 393, 396 (10th Cir. 1968), and a prompt hearing. *See, e.g., Doremus v. Farrell*, 407 F. Supp. 509, 517 (D. Neb. 1975) (three-judge court). However, if civil commitment to a private hosptial is not state action, the a mentally ill person committed to a private hospital would have only the protections afforded by state law.[5]

This is particularly problematic because the state action doctrine furthers the constitutional objective of permitting "citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619 (1991). However, when private physicians civilly commit an individual, the civil committee is given no choice in the matter. She is confined to the facility to which she is brought.[6] Hence, civil commitment differs from other situations in which citizens voluntarily choose to enter in an arrangement with a private party. *See, e.g., American Manufacturers Mutual Insurance Co. v. Sullivan*, __ U.S. __, __, 119 S.Ct. 977, 983 (1999) (dispute between employees of private company and company's insurance carrier); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 153 (1978) (dispute between debtor and private moving company).

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[5] It has been suggested that if a mentally ill person committed to a private hospital believes that the procedural protections under state law are unconstitutional, she can challenge their constitutionality. *See Spencer v. Lee*, 864 F. 2d 1376, 1381 (7th Cir. 1989) (en banc). However, if civil commitment to a private hospital is not state action, then the mentally ill person would not suffer of violation of her constitutional rights and would be at the mercy of the procedures that exist under state law.

[6] In the present case, the petitioner was visiting a physician on an unrelated matter at Columbia Presbyterian Medical Center and hospital staff involuntarily transported her to the psychiatric emergency room of the hospital where staff certified her for involuntary hospitalization. *See* JA-402-404.

The State's plan to privatize psychiatric services underscores the need for review of the Second Circuit's decision. The New York State Office of Mental Health anticipates the "virtual elimination" of acute psychiatric care at State operated facilities. Office of Mental Health, *Statewide Comprehensive Plan for Mental Health Services 1993-1997* 125 (October 1, 1992) ("Statewide Comprehensive Plan"). This means that local hospitals, public and private, will provide initial psychiatric treatment and participate in the civil commitment process. To illustrate, in New York, over the last decade, psychiatric beds in local general hospitals have increased nearly 25%. *Id.* at 2. Hence, State employees will effectuate few civil commitments and increasingly, private actors will confine allegedly mentally ill individuals under State law. The decision below enables the State to evade the limitations imposed by the Fourteenth Amendment by compelling greater participation in the commitment process by private physicians and hospitals.

What has occurred in New York is consistent with the changes nationally. Few states rely wholly on public institutions and "[w]hen psychiatric hospitalization does occur, it is likely to be at a private psychiatric hospital or to a psychiatric unit of a general hospital." Petrila, *Redefining Mental Health Law*, 16 Law & Human Behav. 89, 91 (1992). Indeed, while psychiatric hospitalizations at state hospitals have decreased since 1972, "psychiatric admissions to private hospitals and to psychiatric units within general hospitals have increased markedly." *Id; see also* Timmons, *supra,* at 325-326 (at the national level, private psychiatric hospitals almost doubled in the 1980s).

New York is an example of a state that not only authorizes, but compels, private hospitals to increase their role in the commitment process. Under New York law, a private general

hospital cannot operate a psychiatric ward without a certificate of operation from the State Office of Mental Health. New York Mental Hyg. Law § 31.02(a)(2). However, as a condition of renewal of an operating certificate, the State requires a private hospital to serve a catchment, *i.e.*, geographic, area for involuntary psychiatric admissions. N.Y. Mental Hyg. Law § 31.04(a)(4). Hence, as a condition of providing in-patient psychiatric services, the State requires general hospitals, public and private, to assume primary responsibility for emergency psychiatric admissions, an activity that the state would otherwise assume. *See* N.Y. Mental Hyg. Law § 7.07.

Accordingly, the opinion below creates a situation in which mentally ill individuals lack a federal remedy where there has been a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Lugar v. Edmondson Oil*, 457 U.S. 922, 929 (1982). Significantly, the decision below impermissibly enables the State to contract out, or otherwise delegate, its constitutional responsibilities while leaving its citizens no means for vindicating those rights. *See West v. Atkins*, 487 U.S. 42, 56, n.14 (1988).[7] As one court found, such a result warrants a finding of state action:

> Once the state curtails an individual's liberty through the civil commitment process, it assumes affirmative obligations, imposed by the Constitution, for the individual's care and well-being . . . If the state chooses to delegate

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[7] One can assert that when a citizen interacts with other private individuals, by definition, the Constitution does not protect either party. However, by holding that the contracting out of medical services in a prison does not deprive a prisoner of means of vindicating his Eighth Amendment rights, *see West v. Atkins*, 487 U.S. at 56, this Court has recognized that some rights are governmental in nature and a private citizen does not lose constitutional protection when a state delegates to private parties functions that it would otherwise undertake; *see also Marsh v. State of Alabama*, 326 U.S. 501, 508-09 (1946) (individuals do not lose First Amendment right to distribute religious literature on streets of a company-owned town).

> these responsibilities, and a private hospital chooses to assume them, neither can then argue that the private hospital's acts and omissions do not occur under the color of state law . . . To hold otherwise would allow the state to avoid its constitutional obligations simply by delegating to private hospitals its responsibility for the care of individuals it involuntarily confines [cite omitted], and would render meaningless the recently recognized rights of the involuntarily committed.

Davenport v. Saint Mary Hospital, 633 F. Supp. 1228, 1234 (E.D. Pa. 1986).

II. *CERTIORARI* IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN NUMEROUS STATE AND FEDERAL COURTS.

Whether or not civil commitment is state action is an issue related to fundamental personal liberty that has been litigated extensively for over twenty years. The state courts that have addressed this issue have found that civil commitment constitutes state action. *See Cummings v. Charter Hospital of Las Vegas*, 896 P. 2d 1137, 1145 (Nev. 1995); *Snyder v. Albany Medical Center Hospital*, 206 A.D. 2d 816, 615 N.Y.S. 2d 139, (3d Dep't 1994). These decisions conflict with decisions from the circuit courts that hold that civil commitment is not state action. *See S.P. v. City of Takoma Park, Md.*, 134 F. 3d 260, 270 (4th Cir. 1998); *Pino v. Higgs*, 75 F. 3d 1461, 1465 (10th Cir. 1996); *Ellison v. Garbarino*, 48 F. 3d 192, 196 (6th Cir. 1995); *Rockwell v. Cape Cod Hospital*, 26 F. 3d 254, 258-59, (1st Cir. 1994); *Janicsko v. Pellman*, 774 F. Supp. 331, 339 (M.D. Pa. 1991), *aff'd. without opinion*, 970 F. 2d 899 (3d Cir. 1992); *Harvey v. Harvey*, 949 F. 2d 1127, 1131 (11th Cir. 1992); *Spencer v. Lee*, 864 F. 2d at 1381. The decisions of the Courts of Appeals reversed a trend in which numerous district courts had found that civil commitment is state action. *See Moore v. Wyoming Medical Center*, 825 F. Supp. 1531, 1541 (D. Wyo. 1993); *Rubenstein v. Benedictine Hospital*, 790

F. Supp. 396, 406 (N.D.N.Y. 1992); *Plain v. Flicker*, 645 F. Supp. 898, 908 (D.N.J. 1986); *Davenport v. Saint Mary Hospital*, 633 F. Supp. at 1237; *Kay v. Benson*, 472 F. Supp. 850, 851 (D.N.H. 1979); *Willacy v. Lewis*, 598 F. Supp. 346, 349 (D.D.C. 1984); *Brown v. Jenson*, 572 F. Supp. 193, 197 n.1 (D. Colo. 1983); *Ruffler v. Phelps Memorial Hospital*, 453 F. Supp. 1062, 1068-70 (S.D.N.Y. 1978).

The approaches by the different courts reflect the lack of clarity in state action jurisprudence and the need for guidance on this issue that affects many individuals. The Supreme Court of Nevada concluded that involuntary commitment "is traditionally a public function delegated by the state to private health care providers." *Cummings v. Charter Hospital of Las Vegas*, 896 P. 2d at 1145. Because private health care providers are clothed with the authority of state law, and exercise a power by virtue of such law, they are state actors. *Id.* Other courts that have held that civil commitment is state action have reached their holding through similar analysis. *See, e.g., Snyder v. Albany Medical Center Hospital*, 206 A.D. at 816-17, 615 N.Y.S. 2d at 140 (private physicians can commit only because state has granted them such power); *Rubenstein v. Benedictine Hospital*, 790 F. Supp. at 405-06 (same). As one court recognized, "[i]f the state is not providing the authority to deny an individual his liberty what is providing the authority?" *Plain v. Flicker*, 645 F. Supp. at 905. In this case the district court rejected this reasoning and, without citation, concluded that the authority is derived from the professional medical standard in the community, which is not established by the state. 24a.

The courts that have found that civil commitment does not constitute state action failed to address the issue of the exercise of sovereign authority but applied the four traditional state action tests.[8] Courts have concluded that civil commit-

[8] These tests are as follows: the symbiotic-relationship test, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961); the public function test, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352

ment does not satisfy the public function test because, *inter alia*, historically, private individuals could confine mentally ill individuals for care and treatment. *See Rockwell v. Cape Cod Hospital*, 26 F. 3d at 260; *Spencer v. Lee*, 864 F. 2d at 1380-81; *see also Harvey v. Harvey*, 949 F. 2d at 1131; *Lewis v. Law-Yone*, 813 F. Supp. 1247, 1255 (N.D. Tex. 1993). Courts have also concluded that civil commitment is not state action because the government neither compels nor encourages commitments. *See S.P. v. City of Takoma Park, Md.*, 134 F. 3d at 270; *Ellison v. Gabarino*, 48 F. 3d at 196; *Rockwell v. Cape Cod Hospital*, 26 F. 3d at 258; *Harvey v. Harvey*, 949 F. 2d at 1130; *Spencer v. Lee*, 864 F. 2d at 1379. Finally, courts have concluded that a decision to civilly commit a mentally ill person constitutes an exercise in medical judgment that physicians do not make pursuant to state standards. *See S.P. v. City of Takoma Park, Md.*, 134 F. 3d at 270; *Pino v. Higgs*, 75 F. 3d at 1466; *Janicsko v. Pellman*, 774 F. Supp. at 339.

Particularly because of the trend toward privatization, this issue will persist. In New York, because the decision in *Snyder v. Albany Medical Center Hospital* that civil commitment is state action binds all trial courts throughout the State, *see Mountain View Coach Lines, Inc. v. Storms*, 102 A.D. 2d 663, 664, 476 N.Y.S. 2d 918, 920 (2d Dep't 1984), mentally ill individuals will file § 1983 lawsuits in state court. Likewise, in the other circuits in which the Court of Appeals has ruled that civil commitment is not state action, individuals who have suffered violations of their constitutional rights while hospitalized will also turn to state court.[9] These courts will have to choose between the various approaches to the state action question taken by the courts that have addressed this

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(1974); the nexus test, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); and, the joint participation test. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

[9] Decisions of the circuit courts on this federal question serve as persuasive authority but are not binding on state courts. *See, e.g., People v. Kan*, 78 N.Y. 2d 54, 60, 571 N.Y.S. 2d 436, 439 (1991).

issue. Because of the fundamental interests at stake, this Supreme Court should resolve this issue that has been litigated extensively for over twenty years.

Moreover, by addressing this issue, this case provides this Court with an opportunity to clarify a number of diverse, but ultimately connected, components of state action jurisprudence. First, this case will require this Court to address the role of the State when an individual suffers a deprivation of rights. To date, when addressing the state action issue, this Court has only examined the role of the government when an individual sought constitutional protection for the receipt of services. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353 (provision of utility services); *Blum v. Yaretsky*, 457 U.S. at 1011 (provison of medical services in general); *West v. Atkins*, 487 U.S. at 56 (provision of medical services to prisoner); *American Manufacturuers v. Sullivan*, __ U.S. at __, 119 S.Ct. at 988 (provision workers' compensation benefits). However, the Due Process Clause protects against deliberate "decisions of government officials to *deprive* a person of life, liberty or property." *Collins v. Harker Heights*, 503 U.S. 115, 127, n.10 (1992) (emphasis added). As such, the Constitution has been described as a "charter of negative rather than positive liberties." *Jackson v. City of Joliet*, 715 F. 2d 1200, 1203 (7th Cir. 1983).[10] This case provides this Court with an opportunity to clarify the relationship between the Due Process Clause and the actions of private individuals who deprive individuals of an interest in liberty. While *West v. Atkins* makes clear that the government cannot evade its governmental obligations by contracting out the provision of medical services to prisoners, the varying decisions of the lower

[10] It has been noted that "[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services." *Jackson v. City of Joliet*, 715 F.2d at 1203.

courts on the issue at hand establish that it is unclear whether the government can avoid substantive and procedural limitations on its police power and *parens patriae authority* by delegating its sovereign power to private individuals.

This case will also enable this Court to clarify the interrelationship between the functional approach to state action jurisprudence, *see Polk County v. Dodson*, 454 U.S. 312, 320-22 (1981); *West v. Atkins*, 487 U.S. at 56, and the public function doctrine. The decision of the district court illustrates how, to date, courts have been extremely reluctant to examine the function performed by a private citizen, when applying the public function doctrine. *See* 24a. While the traditional state action tests provide a framework for any state action decision, *see supra* note 8, it remains unclear whether the functional approach is simply an alternative way of applying the public function doctrine, *see American Manufacturuers v. Sullivan*, __ U.S. at __, 119 S.Ct. at, 987-88, or is a discrete alternative to the four traditional state action tests. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. at 624, *Polk County v. Dodson*, 454 U.S. at 320-21.

The need for clarification of these issues is particularly great because of the significant trend toward the privatization of governmental activities. The move toward privatization exists particularly at the state and local level, in such areas as tax collection, the operation of prisons, the operation of hospitals, fire prevention and dispute resolution. *See, e.g.*, Morris, Note. *The Impact of Constitutional Liability on the Privatization Movement after Richardson v. McKnight*, 52 Vand. L. Rev. 489, 492-94 (1999).

III. THE OPINION BELOW IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

Any state action determination requires a court to examine the "essential dichotomy" between public and private acts. *See American Mfrs. Mut. Ins. Co. v. Sullivan*, __ U.S. at __,

119 S.Ct. at 986. Once physicians civilly commit a mentally ill person, they engage in a public, not a private act, as civil commitment is an exercise of a state's *parens patriae* or police power. *Addington v. Texas*, 441 U.S. at 426; *see also Olmstead v. L.C. ex rel. Zimring*, __ U.S. __, __, 119 S.Ct. 2176, 2190 (1999) (States acknowledge that "care of the mentally disabled is their special obligation").[11] Accordingly, civil commitment is activity that has been "traditionally associated with sovereignty" and not actions of a private entity taken "in the course of its business." *Blum v. Yaretsky*, 457 U.S. at 1011.

Civil commitment can be characterized as a typical state action case since it involves a situation in which "the State [has] provided a mantle of authority that enhanced the power of the harm-causing individual actor." *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 192 (1988). Because civil commitment involves a delegation of state authority and the state has created the legal framework governing the conduct in question, civil commitment is state action. *See id.*

Furthermore, a state action determination requires a court to examine the function undertaken by the private party. For example, in *West v. Atkins*, this Court concluded that a doctor who is under contract with a State to provide medical services in a prison engages in state action not because the State pays him, but because of the "relationship among the State, the physician and the prisoner." 487 U.S. at 56. In so holding, this Court explicitly noted that "the *context* in which respondent

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[11] As one court noted,

> [t]here can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society . . . Additionally, the States are vested with the historic *parens patriae* power, including the duty to protect "persons under legal disabilities to act for themselves."

Ruffler v. Phelps Memorial Hospital, 453 F. Supp. at 1070 (quoting *O'Connor v. Donaldson*, 422 U.S. at 582-83 (Burger, C.J., concurring).

[physician] performs these services for the State (*quite apart from the source of remuneration*) distinguishes the relationship between respondent and West from the ordinary physician-patient relationship." 487 U.S. at 56, n.15 (emphasis added).

On the other hand, a public defender whom a state also pays is not a state actor. *See Polk County v. Dodson*, 454 U.S. at 320-34. Unlike doctors who commit patients and hence have interests adverse to the individual, public defenders represent the legal interests of their clients and hence, are in an adverse relationship with the state. 454 U.S. at 320-322, 323, n.13.

The courts below failed to examine the relationship among the petitioner, the State, and the private doctors to whom the State delegated its sovereign power. The functions of a doctor who involuntarily hospitalizes a mentally ill person are to "protect *the interest of the public* as well as that of his wards." *Polk County v. Dodson*, 454 U.S. at 319. (emphasis added). In other words, "[i]nstitutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve." *Id.* at 319-20.[12] Hence, because private physicians who commit a mentally ill person assume the role of the State, civil commitment is state action. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 844 (1982) (White, J. concurring).

That the State has delegated its authority to confine individuals to doctors at private hospitals "does not change the governmental character of the power exercised." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. at 626. Accordingly,

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[12] It is not relevant that this Court in *Polk County* may have been referring to state-employed institutional physicians. *Polk County* and West establish that, when engaging in state action analysis, the source of payment to the professional is not a relevant consideration. Rather, it is the function of the private actor and his role *vis-a-vis* sovereign activity. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. at 627.

the holding below is also inconsistent with this Court's state action jurisprudence because it misapplied the public function test. The public function test requires a determination of whether the action in question has been " 'traditionally the exclusive prerogative of the State.' " *Blum v. Yaretsky*, 457 U.S. at 1005 (quoting *Jackson v. Metropolitan Edison Co., Inc.*, 419 U.S. at 357.

This Court has recognized that a State may delegate its inherently sovereign power. However, when a states delegates such power, there is still state action and individuals do not lose constitutional protection. As this Court noted in *Jackson v. Metropolitan Edison*, "[i]f we were dealing with the exercise by Metropolitan of some power *delegated to it* by the State which is traditionally associated with sovereignty . . . our case would be quite a different one." 419 U.S. at 352-53 (emphasis added).

The involuntary commitment of an allegedly mentally ill individual is an exercise of sovereign power. "Under English law at the time of the settling of the American colonies, the King had the authority to act as 'the general guardian of all infants, idiots, and lunatics.' " *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1207 (1974) ("Developments in the Law") (quoting H*awaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972). This authority was known as *parens patraie*. Developments in the Law, *supra* at 1208. After the American Revolution, the *parens patraie* power was vested in state legislatures. *Id.* The state's police power, also part of the state's sovereign authority, is used to protect the public. *Id.*, at 1222. Hence, any confinement by a private individual is an act that has been delegated by the sovereign since "[t]he State's power to commit individuals rests on the inherent attributes of sovereignty and may be traced to two separate aspects of sovereign authority:" the state's *parens patriae* and police powers. Brakel, Parry & Weiner, *The Mentally Disabled and the Law* 24 (3 ed. 1985); *see also Addington v. Texas*, 441 U.S. at 426 (recognizing

civil commitment involves exercise of state's police and *parens patriae* powers).

This Court's resolution of the state action issue in election cases illustrates the "essential dichotomy" between private and public acts and compels a determination that civil commitment is a public act and hence, state action. While private primary elections are conducted by private political parties, they are done so under state statutory authority, state courts are given exclusive jurisdiction over contested elections, state statutes impose duties on the parties and "the duties do not become matters of private law because they are *performed* by a political party." *Smith v. Allwright*, 321 U.S. 649, 663 (1944) (emphasis added).

The process involving involuntary hospitalization parallels that of the election process. Private physicians can hospitalize patients only under state statutory authority, N.Y. Mental Hyg. Law § 9.03, state statutes determine the standards and procedures for the commitment of allegedly mentally ill individuals, *see* N.Y. Mental Hyg. Law §§ 9.27; 9.37; 9.39; 9.40; 9.41; 9.43; 9.55, state courts determine whether or not patients satisfy the statutory requirements for commitment, N.Y. Mental Hyg. Law § 9.31, and state statutes and regulations impose duties on the committing hospitals in areas ranging from treatment to the assumption of primary responsibility for emergency admissions in certain catchment areas. *See, e.g.*, N.Y. Mental Hyg. Law § 31.04(a)(4); 14 NYCRR Parts 527 and 580. Just as an election does not lose its governmental character when performed by private parties, neither does the civil commitment process.

Unlike *American Manufacturers*, this is not a case of an aggrieved party characterizing State inaction as "authorization or encouragement." __ U.S. at __, 119 S.Ct. at 987. Historically, the respondents could not have taken the action that they did absent a delegation of state authority. Since 1788, state law governed the involuntary confinement of mentally

ill individuals.[13] In addition to statutory law, under common law, any individual could detain a mentally ill person who was causing *immediate* injury. *See, e.g., Warner v. State of New York*, 297 N.Y. 395, 401, 79 N.E. 2d 459, 462 (1948); *Emmerich v. Thorley*, 35 App. Div. 452, 456, 54 N.Y.S. 791, 794 (1st Dep't 1898). *Emmerich* illustrated the type of harm that warranted summary detainment as the person "was actually in the act of throwing herself out of a window to escape fancied pursuers." *Warner v. State of New York*, 297 N.Y. at 401, 79 N.E. 2d at 462. However, under the existing state commitment law and the federal Constitution, a person is committable when she poses simply a substantial *threat* of physical harm. *See, e.g., Matter of Scopes v. Shah*, 59 A.D. 2d 203, 205-206, 398 N.Y.S. 2d 911, 913 (3d Dep't 1977); *Matter of Carl C.*, 126 A.D. 2d 640, 640, 511 N.Y.S. 2d 144, 145 (2d Dep't 1987). Under the State's civil commitment law, a hospital may confine a person who is not creating an imminent risk of harm but who poses a threat of harm in the future. For example, a psychiatric hospital may confine a mentally ill person who is not presently creating a risk of harm but who may cause harm in the future because he has a history of noncompliance with medication and may stop taking medication if released from the hospital. *See Seltzer v. Hogue*, 187 A.D. 2d 230, 237-38, 594 N.Y.S. 2d 781, 785 (2d Dep't 1993).[14]

Furthermore, even at common law, the respondents would have needed state authority to confine the petitioner for thir-

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[13] In 1788, New York authorized city or town officials, upon a warrant issued by two justices, to lock up a "lunatic or mad person." 1788 N.Y. Laws ch. 31. In 1874, New York passed a law authorizing the commitment of a mentally ill person upon the certificates of two physicians but requiring a court to approve any confinement longer than five days. 1874 N.Y. Laws ch. 446, § 1.

[14] A reading of the record below details that the respondents never asserted that the petitioner was causing immediate injury. Rather, the respondents believed that the petitioner might cause harm sometime in the future. *See* JA-165-168; 175-176; 401-405.

teen days. At common law, if someone restrained a mentally ill person, it was his or her duty to "at once . . . invoke the agencies established by law for the care and protection of the insane, and to institute that proceeding which was required to authorize her further detention." *Emmerich v. Thorley*, 35 App. Div. at 457, 54 N.Y.S. at 794.

Ultimately, a determination as to whether respondents could have acted in the absence of state authorization turns on the meaning of liberty within the Constitution. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Common law permitted an insurance company to defer payment pending substantiation of its reasonableness, *see American Manufacturers*, U.S. __ at __, 119 S. Ct. at 987, and the utility company in *Jackson v. Metropolitan Edison* was at liberty to build a business and provide utility services. *See* 419 U.S. at 354, n.9; *see also Rendell-Baker v. Kohn*, 457 U.S. at 840-41 (private school not fundamentally different than other corporations that contract with the government). Notwithstanding the ability of relatives to lock up a mentally ill person in eighteenth century England, *see Spencer v. Lee*, 864 F. 2d at 1380-81, the law in New York dating back to 1788 did not permit physicians or anyone else, in the absence of state authority, to (1) confine a mentally ill person who was not presenting an immediate risk of harm for any period of time, and (2) lock up a mentally ill person for thirteen days even if the person was creating an immediate risk of harm. *See supra* at 19.

CONCLUSION

For the reasons given in this petition, this Court should grant this petition for *certiorari*.

Dated: Huntington, New York
September 8, 1999

WILLIAM M. BROOKS
(*Counsel of Record*)
Mental Disability Law Clinic
Attorney for Petitioner
Touro Law Center
300 Nassau Road
Huntington, New York 11743
(516) 421-2244 ext. 331

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1065—August Term, 1998

(Argued: January 13, 1999 Decided: January 29, 1999)

Docket No. 98-7803

RHODA OKUNIEFF,

Plaintiff-Appellant,

—v.—

R. ROSENBERG, M.D., personally, ANNE SKOMOROSSKY, M.D., personally, LORRAINE INNES, M.D., personally, STAN ACROW, M.D., personally, ELIZABETH MIRABELLO, M.D., personally, JANE DOE, personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER, HERBERT PARDES, in his official capacity as head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Defendants-Appellees.

Before:

JACOBS and SOTOMAYOR, *Circuit Judges*, and SAND, *District Judge*.*

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* The Honorable Leonard B. Sand of the United States District Court for the Southern District of New York, sitting by designation.

After being involuntarily committed to the psychiatric ward at Columbia Presbyterian Medical Center, Okunieff filed suit in the United States District Court for the Southern District of New York (Sweet, *J.*) alleging, under 42 U.S.C. § 1983, that her commitment constituted a violation of her rights under the Fourth and Fourteenth Amendments. The district court dismissed the action on the ground that the defendants, all private individuals or entities, had not acted under color of state law. On appeal, the plaintiff challenges that decision, as well as certain discovery rulings made by the district court.

Affirmed.

WILLIAM M. BROOKS, Huntington, NY (Mental Disability Law Clinic, Touro College, Jacob D. Fuchsberg Law Center, on the brief), *for Plaintiff-Appellant.*

BARRY I. LEVY, New York, NY (Lewis Rosenberg, Angela Thompson-Tinsley, Shapiro, Beilly, Rosenberg, Albert & Fox, LLP, on the brief), *for Appellee Richard Rosenberg, M.D.*

PATRICIA D'ALVIA, New York, NY (Gregory J. Radomisli, Peter T. Crean, Martin, Clearwater & Bell, on the brief), *for Remaining Appellees.*

PER CURIAM:

On May 5, 1996, Rhoda Okunieff was involuntarily committed to the psychiatric ward at Columbia Presbyterian Medical Center. After successfully challenging her confinement pursuant to § 9.31 of New York's Mental Hygiene Law, she was released on May 16, 1996. She then brought suit alleging, under 42 U.S.C. § 1983, that her physician, as well as Columbia Presbyterian and several of Columbia Presbyterian's employees—all private individuals or entities—had violated rights secured to her by the Fourth and Fourteenth Amendments to the Constitution. Okunieff's complaint also contained several state law causes of action.

The district court, granting the defendants' motion for summary judgment, dismissed Okunieff's § 1983 claim on the ground that the defendants are not state actors and that they therefore did not act under color of state law. *See Okunieff v. Rosenberg*, 996 F. Supp. 343, 348-58 (S.D.N.Y. 1998). The court dismissed Okunieff's state law claims pursuant to 28 U.S.C. § 1367(c)(3) (1994). *See id.* at 358. On appeal, Okunieff challenges the district court's conclusion that the defendants are not state actors. She also challenges certain of the district court's discovery rulings.

On the question of whether the defendants acted under color of state law, we affirm for substantially the reasons set forth in the district court's comprehensive and scholarly opinion. We further conclude that the district court did not abuse its discretion in denying Okunieff the discovery she sought.

The judgment is therefore affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
97 Civ. 3205 (RWS)

RHODA OKUNIEFF,

Plaintiff,

—against—

R. ROSENBERG, M.D., personally, ANNE SKOMOROSSKY, M.D., personally, LORRAINE INNES, M.D., personally, STAN ARCOW, M.D., personally, ELIZABETH MIRABELLO, M.D., personally, JANE DOE, personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER, HERBERT PARDES, in his official capacity of head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Defendants.

APPEARANCES:

TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Attorney for Plaintiff
300 Nassau Road
Huntington, NY 11743

By: WILLIAM M. BROOKS, ESQ.
Of Counsel

SHAPIRO, BEILLY, ROSENBERG, ALBERT & FOX
Attorney for Defendant Richard Rosenberg, M.D.
225 Broadway—Suite 1115
New York, NY 10007

By: LEWIS ROSENBERG, ESQ.
BARRY I. LEVY, ESQ.
ANGELA THOMPSON-TINSLEY, ESQ.
Of Counsel

MARTIN, CLEARWATER & BELL
Attorney for Remaining Defendants
220 East 42nd Street
New York, NY 10017
By: PETER T. CREAN, ESQ.
GREGORY J. RADOMISLI, ESQ.
TIFFANY L. BAUMAN, ESQ.
Of Counsel

OPINION

Sweet, D.J.

Defendants Anne Skomorossky, M.D., Lorraine Innes, M.D., Stan Arcow, M.D., Elizabeth Mirabello, M.D., Presbyterian Hospital in the City of New York, s/h/a Columbia Presbyterian Medical Center, and Herbert Pardes, M.D. (individually, "Rosenberg," together with the Hospital Defendants, the "Defendants") have moved for summary judgment pursuant to Rule 56, Fed. R. Civ. P., in this action filed by Plaintiff Rhoda Okunieff ("Okunieff") on the grounds that they are not state actors, and therefore Okunieff's claim pursuant to 42 U.S.C. § 1983 must fail. Defendants also seek an Order dismissing Plaintiff's state law claims pursuant to 28 U.S.C. § 1367(c)(3).

For the reasons set forth below, (1) Defendants' motions for summary judgment are granted, and (2) Plaintiff's state law claims are dismissed.

Parties

At the time relevant to this action, Rhoda Okunieff was enrolled in a Masters Degree program in Biostatistics at Columbia University and a Masters Degree program in Mathematics at New York University.

Defendant Columbia Presbyterian Medical Center ("CPMC") is a private medical institution doing business as a private corporation.

Defendant Anne Skomorossky, M.D. was, at the time relevant to this action, a resident at CPMC.

Defendant Lorraine Innes, M.D., Stan Arcow, M.D., and Elizabeth Mirabello, M.D., are private attending physicians with privileges at CPMC.

Herbert Pardes is the head of the Department of Psychiatry at CPMC.

Defendant Rosenberg is a private physician with privileges at CPMC.

Defendant Rosenberg is a private physician with privileges at CPMC.

Prior Proceedings

Okunieff filed this action pursuant to 42 U.S.C. § 1983 on May 2, 1997. The complaint was amended on May 19, 1997. This action arises out of the involuntary psychiatric hospitalization of Okunieff. The complaint alleges violation of Plaintiff's civil rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. Okunieff also has filed pendent state law claims, including false imprisonment, and violations of Plaintiff's rights to informed consent, to determine Okunieff's own course of treatment, and to confidentiality.

The instant summery judgment motion by Rosenberg was filed on October 10, 1997, and the motion by the Hospital Defendants was filed November 10, 1997. Argument on both motions was heard on March 12, 1998, at which time the motions were considered fully submitted.

Facts

On April 30, 1996, Okunieff went to Rosenberg's office on Port Washington Avenue for a general physical exam. Rosenberg, at that time, maintained private offices at 161 Fort Washington Avenue and 903 Park Avenue, New York, New York. Okunieff was independently referred to Rosenberg through her insurance company, Oxford Health Plans (the "Oxford Plan"). Rosenberg participated as a primary care physician under the Oxford Plan. This was Okunieff's first visit to Dr. Rosenberg.

Rosenberg's examination of Okunieff revealed that she had been under a lot of stress for a significant period of time, relating to her job and educational responsibilities as well as her personal life. She had also been experiencing depression and crying spells. During the examination, Okunieff began exhibiting symptoms indicative of psychotic behavior. According to Rosenberg, Okunieff told Rosenberg that her parents (who live in Michigan) had been entering her New York apartment and had placed things such as salad dressing and ketchup around her apartment. Okunieff also advised Rosenberg that her employer had suggested she seek psychiatric help.

It was Rosenberg's medical opinion that Okunieff needed immediate psychiatric treatment. Rosenberg arranged for Okunieff to meet with Dr. Judith Lewis, a private psychiatrist, on May 2, 1996. At that point, Okunieff left Rosenberg's office.

Okunieff failed to keep the appointment with Dr. Lewis because she did not know Dr. Lewis and her fees were high. Dr. Lewis contacted Rosenberg on May 2 or 3, 1996, informing him that Okunieff had failed to appear for her appointment. Rosenberg's secretary called Okunieff on the morning of May 3, 1996, asking Okunieff to come to Rosenberg's office. Okunieff agreed, as she wanted to obtain results of her blood test. She, however, was concerned that she would be late for another appointment she had with a gynecologist. Upon Okunieff's arrival, Rosenberg observed that her psy-

chological condition had severely deteriorated since he last saw her on April 30, 1996.

When Rosenberg asked Okunieff to discuss her situation, she appeared frightened to enter his office and ran away as Rosenberg attempted to speak with her in the hallway. It was Rosenberg's medical opinion that Okunieff was experiencing a paranoid psychotic episode and presented a potential danger to herself. Rosenberg then called Dr. Lewis to discuss Okunieff and her behavior. Dr. Lewis recommended that Rosenberg try to locate Okunieff and have her escorted by hospital security to the psychiatric emergency room for an evaluation. Rosenberg wrote a medical order authorizing hospital security to transport Okunieff to CPMC. Rosenberg is not an employee of CPMC. He merely has privileges there.

Okunieff reappeared momentarily. Again, when Rosenberg attempted to speak with Okunieff, she became agitated and ran out of the office. Rosenberg then alerted security, suspecting that Okunieff would return. According to Okunieff, she left Rosenberg's office because she did not want to discuss her blood test results in the waiting room, and she did not want to be late for her gynecological appointment. She maintains that at no time did she appear agitated in the presence of Rosenberg, nor was she a threat to herself or others.

When Okunieff once again returned to Rosenberg's office, security officers had arrived. Rosenberg advised Okunieff that she would be escorted to the psychiatric emergency room so that she could be evaluated. According to Rosenberg, Okunieff's delusions became so severe that she accused him of being an imposter. Okunieff again ran away and was later found lying on the floor of the adjacent hospital building. The supervising nurse of the hospital building requested that Rosenberg sign an order permitting the use of four-point restraints, if necessary. Rosenberg signed the order, but such restraints proved unnecessary. Okunieff was escorted to CPMC without them.

At the CPMC psychiatric emergency room, Okunieff met with Drs. Anne Skomorossky and Lorraine Innes. Both physi-

cians certified Okunieff for involuntary commitment after concluding that she was dangerous and no adequate alternate forms of treatment existed at that time, as is required under the New York Mental Hygiene Law ("MHL") § 9.27 (McKinney 1996). For Okunieff's commitment to meet the MHL requirements, a staff physician must confirm the two physicians' evaluation. Dr. Stan Arcow executed such confirmation. Okunieff was committed on May 5, 1996. Pursuant to the MHL, Okunieff challenged her confinement and requested a hearing. On May 16, 1996, CPMC was directed to release Okunieff. It did so later that day.

None of the physicians above is a state employee, and CPMC is a private hospital that is licensed to provide emergency psychiatric services and treat mentally disabled persons.[1]

Discussion

I. Standard for Summary Judgment

Rule 56(e) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Silver v. City University*, 947 F.2d 1021, 1022 (2d Cir. 1991).

"The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." *Rodriguez v. City of New York*, 72 F.3d 1051, 1060 (2d Cir. 1995). In determining whether a genuine issue

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[1] Under MHL § 31.02, general hospitals may not operate a psychiatric wing without an operating license issued by the New York State Office of Mental Health ("OMH"). CPMC had such a license. CPMC also was licensed by the OMH Commissioner to operate a comprehensive psychiatric emergency program ("CPEP") under MHL § 31.27. A CPEP serves as a primary psychiatric emergency provider.

of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. v. Zenith Radio Corp*, 475 U.S. 574, 587 (1986); *Brady v. Town of Colchester*, 863 F.2d 205, 210 (2d Cir. 1988). If there is any evidence in the records regarding the issues on which summary judgment is sought from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper. *See Knowles v. New York City Dept. Of Corrections*, 904 F. Supp. 217, 220 (S.D.N.Y. 1995).

A party seeking to defeat a summary judgment motion cannot "rely on mere speculation or conjecture as to the true nature of facts to overcome the motion." *Lipton v. Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995) (quoting *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986). Rather, the responding party "must show the existence of a disputed material fact in light of the substantive law." *Peer Int'l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 564 (S.D.N.Y. 1995). In the absence of any disputed material fact, summary judgment is appropriate.

II. *Summary Judgment Is Granted Because the Defendants Are Not State Actors*

Section 1983 of Title 42 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C.A. § 1983 (West Supp. 1997). The constitutional sections creating the substantive rights in this case are the Fourth and Fourteenth Amendments. Because the Amendments are directed at the States, they can be violated only by "state action" and not by the conduct of a private actor.

"Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982). Section § 1083's "under color of law" requirement is treated " 'as the same thing' as the 'state action' " requirement under the Constitution. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (quoting *United States v. Price*, 383 U.S. 787, 794 n.7 (1966)).

To prevail in this § 1983 action, Okunieff must show (1) that Defendants deprived her of a right secured by the Constitution or laws of the United States and (2) that, in doing so, Defendants acted under color of state law. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156-57 (1978). As to the first requirement, it has been established that involuntary confinement—or civil commitment—constitutes a significant deprivation of liberty requiring due process protection. *See Addington v. Texas*, 441 U.S. 418, 425 (1979). The critical issue in this case, however, is not whether Okunieff has a liberty interest in being free from unwarranted confinement, but whether the actions of a private physician, Defendant Rosenberg, who authorized the transport of Okunieff to CPMC for psychiatric evaluation, and the actions of the Hospital Defendants, who committed Okunieff could be considered the actions of the State for the purposes of liability under 42 U.S.C. § 1983. According to Okunieff, Defendants are state actors because they derived the authority to commit her from the laws of New York State.

"The ultimate issue in determining whether [the Defendants are] subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?' " *Rendell-Baker*, 457 U.S. at 838 (quoting *Lugar*, 457 U.S. at 937). For conduct of the Defendants to be fairly attributable to the State, Defendants must be state actors. *See Lugar*, 457 U.S. at 937. In the instant case, the group of Defendants consists of private physicians and a private hospital. "Only in rare circumstances can a private party be

viewed as a 'state actor' for section 1983 purposes." *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992). The Supreme Court has developed a number of approaches to determine whether a private party's conduct may constitute state action, including (1) the state compulsion test, (2) the close nexus/joint action test, and (3) the public function test.

Under the state compulsion test, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (citing *Flagg Bros., Inc.*, 436 U.S. at 164-65). The close nexus/joint action test requires Plaintiff to demonstrate " 'a sufficiently close nexus between the State and the challenged action of the (private) regulated entity so that the action of the latter may be fairly treated as that of the State itself.' " *Id.* (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). Finally, the public function test is satisfied if the private party performs a function that is " 'traditionally the exclusive prerogative of the State.' " *Id.* at 1005 (quoting *Jackson*, 419 U.S. at 353).

These three tests have been employed by various courts of appeals to determine whether involuntary commitment by private parties pursuant to state statute converts private conduct into state action for purposes of § 1983. The First, Third (by affirming the district court opinion), Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits all agree that such action does not constitute state action. *See S.P. v. City of Takoma Park, Md.*, 134 F.3d 260 (4th Cir. 1998); *Pino v. E.P. Higgs, 75 F.3d* 1461 (10th Cir. 1996); *Ellison v. A.J. Garbarino, M.D.*, 48 F.3d 192 (6th Cir. 1995); *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 257-60 (1st Cir. 1994); *Harvey v. Harvey*, 949 F.2d 1127 (11th Cir. 1992); *Janicsko v. Pellman*, 774 F. Supp. 331 (M.D. Pa. 1991), *aff'd without opinion*, 970 F.2d 899 (3d Cir. 1992); *Spencer v. Lee*, 864 F.2d 1376 (7th Cir. 1989) (en banc). The issue has not heretofore been presented to the Second Circuit. The facts of this case lead to the same conclu-

sion. Application of the state compulsion, public function, and close nexus tests below reveals the absence of state action.

A. *The Hospital Defendants Are Not State Actors*

1. *State Compulsion*

The Hospital Defendants are not state actors because the MHL neither compels nor encourages involuntary commitment "any more than repossession laws are passed because states want to encourage creditors to repossess their debtors' goods." *Spencer*, 864 F.2d at 1379. Okunieff was committed pursuant to § 9.27 of the MHL, which by its terms is permissive, not mandatory. *See, e. g., Rockwell*, 26 F.3d at 258 (finding no state compulsion where Massachusetts statute did not compel or encourage involuntary commitments). Like similar state statutes under which state compulsion was lacking, New York's MHL simply sets forth a mechanism to effect involuntary commitments when necessary. *See S.P.*, 134 F.3d at 269-70; *Ellison*, 48 F.3d at 196; *Rockwell*, 26 F.3d at 258; *Harvey*, 949 F.2d at 1130-31; *Janicsko*, 774 F. Supp. at 338-39. The language of MHL § 9.27 is not one of compulsion. MHL § 9.27(a) states:

> The director of a hospital *may* receive and retain therein as a patient any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission of such person. The examination may be conducted jointly but each examining physician shall execute a separate certificate.

MHL § 9.27(a) (emphasis added). The use of the word "may" is convincing of the lack of encouragement or exercise of coercive power by the state, factors that must exist under the state compulsion test.[2] *See Blum*, 457 U.S. at 1004. Even

[2] Courts have even found state compulsion lacking despite existence of coercive language in state statutes comparable to the MHL.

though the MHL provides the legal framework under which physicians may involuntarily commit a patient by creating procedures and standards for commitment, as Okunieff points out, it leaves the decision to commit completely to the physician's discretion. *See Janicsko*, 774 F. Supp. at 338-39 (finding significant that physicians retained discretion to determine when commitment is necessary under the Pennsylvania Mental Health Procedures Act).

According to Okunieff, New York State exercises coercive authority because a person may be involuntarily committed only pursuant to the MHL. However, the state compulsion inquiry does not focus on whether commitment may be effectuated only by statute but whether the State compels the action of involuntary commitment. The Hospital Defendants, and not the State, exercised professional medical judgment to determine whether Okunieff needed to be committed. As the Supreme Court held in *Blum*, 457 U.S. at 1008, a state is not liable for determinations that "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Blum* regarded a suit against the Commissioner of New York State Department of Public Services based on actions of a privately operated nursing home that had downgraded the plaintiff

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Maryland's involuntary commitment statute states that "[i]f an emergency evaluee meets the requirements for involuntary admission and is unable or unwilling to agree to a voluntary admission . . . , the examining physician *shall* take the steps needed for involuntary admission." *S.P.*, 134 F.3d at 269 (quoting Md. Code Ann., Health-Gen. I § 10-625(a) (1994)). The Fourth Circuit held that although the statute uses language which suggests a degree of coercion, the entire involuntary commitment scheme in Maryland is permissive and leaves much discretion to the private physician or hospital. *See id.* at 270. Likewise, because of the word "shall" in the Pennsylvania statute, the court in *Janicsko* noted that the statute "does not clearly allocate all the discretion of commitment to a physician, and, in fact, uses language which suggests a degree of coercion." *Janicsko*, 774 F. Supp. at 338. Regardless, the court found that the "shalls" related to the necessity of emergency treatment and were included to offer more protection to the person to be committed rather than to compel civil commitment by private actors.

Medicaid patients from a high level to a lower level of care. Although the State subsidized the nursing homes, extensively regulated and licensed them, and paid patient expenses, the Supreme Court held that the home's decision to discharge patients to other nursing homes that provided a lower level of care was made in its capacity as a private entity according to private professional, and not state-mandated, standards. *See id.* "[P]hysicians, and not the forms make the decision about whether a patient's care is medically necessary . . . . We cannot say that the State, by requiring completion of a form, is responsible for the physician's decision." *Id.* at 1006-07. Here too, the private physicians employed medical judgment based on standards accepted in the medical community when rendering their decision. MHL § 9.27 provided the procedure the physicians were to follow for a valid commitment; for example, the statue requires certificates by two physicians, MHL § 9.27(a), and asks that the physicians consider alternative forms of treatment and care before committing a patient, MHL § 9.27(d). The MHL does not, however, contain comprehensive standards or definitions that may be applied by rote, leading a physician to the conclusion that involuntary commitment is, or is not, warranted in any given case.

Okunieff relies on the Second Circuit's opinion in *Catanzano v. Dowling*, 60 F.3d 113 (2d Cir. 1995), in contending that the standards set forth in the MHL replaced the judgment of the private physicians. In *Catanzano*, Medicaid patients challenged decisions to reduce health care services made by certified home health care agencies ("CHHAs"), agencies licensed by New York State to provide home health care services under Medicaid. 60 F.3d at 115. The Second Circuit found the CHHAs to be state actors because, *inter alia*, CHHAs are required to evaluate all potential recipients of care; CHHA decisions are made pursuant to standards defined by the Department of Health in regulations; the statute provides the specific alternatives the CHHA must consider when making efficiency determinations mandated by statute; and the State commands denial of treatment if the CHHA con-

cludes after applying the standards set by the statute that home health care is inappropriate. *See id.* at 119. The coercive power and significant encouragement by the State in *Catanzano* is absent in the instant case. Unlike the statute governing the CHHAs, the MHL does not require commitment, set forth the alternatives a physician must consider before ordering commitment, or define the standards a physician must apply when deciding the fate of one facing involuntary commitment.

New York's MHL states:

> "in need of involuntary care and treatment" means that a person has a *mental illness* for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgment is so impaired that he is unable to understand the need for such care and treatment.
>
> "Likelihood to result in serious harm" or "likely to result in serious harm" means (a) a *substantial risk* of physical harm to the person as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself, or (b) a *substantial risk* of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear or serious physical harm.

MHL § 9.01, Definitions. Neither "mental illness" nor "substantial risk" is defined. Instead, private physicians must apply generally accepted standards of the medical community to determine whether a patient has a "mental illness" or poses a "substantial risk" to oneself or others. *Cf. Janicsko*, 774 F. Supp. at 339 (finding that despite the extensive definition of the term "severely mentally disabled" in the Pennsylvania Mental Health Procedures Act, the statute "nevertheless leaves a sufficient degree of this determination to the discretion of a medical practitioner using the non-governmentally imposed criteria of the medical profession").

The professional medical judgment exercised by the Hospital Defendants in the instant case is akin to that exercised under MHL § 9.39. The Second Circuit has held that § 9.39 incorporates the medical community's generally accepted standards as a matter of law. *See Rodriguez v. City of New York*, 72 F.3d 1051, 1063 (2d Cir. 1995). The plaintiff in *Rodriguez* was involuntarily committed pursuant to MHL § 9.39, which provides that a person "alleged to have a mental illness for which immediate observation, care, and treatment in the hospital is appropriate," may be admitted if a hospital staff physician finds that the mental illness "is likely to result in serious harm" to the individual or others.[3] MHL § 9.39. The *Rodriguez* court confronted the issue of whether the defendants, a city hospital, a resident of the city hospital, and the attending physicians of the city hospital, complied with § 9.39. *See Rodriguez*, 72 F.3d at 1053. The parties' expert physicians had testified to differing definitions of the generally accepted meaning within the medical community of § 9.39's use of "threat[ ] . . . . of suicide" and "conduct demonstrating [that a person] is dangerous to himself." *Id.* at 1057. The Second Circuit held that the district court below had

> correctly interpreted § 9.39 as "implicitly defer[ring] to medical judgment," and it correctly construed that section as "requir[ing] a physician to make a medical decision, guided by standards that are generally accepted within the medical community." Implicit in § 9.39's requirement that the decision be made by a physician is the premise that the decision will be made in accordance with the standards of the medical profession.

Id. at 1062-63 (citations omitted).

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[3] MHL § 9.39 defines "likelihood to result in serious harm" to include, *inter alia*, "substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself." MHL § 9.39.

As Okunieff acknowledges, although § 9.27 does not require a finding of dangerousness on its face (unlike § 9.39, New York courts have recognized that a person cannot be committed unless deemed dangerous, *i.e.*, by posing a substantial threat of harm to his or her person or others. *See, e.g., Matter of Scopes v. Shah*, 59 A.D. 2d 203, 205-06, 398 N.Y.S. 2d 911, 913 (3d Dep't 1977). Because the analysis physicians employ for commitments under § 9.39 must also be employed for commitments under § 9.27, it follows that, given *Rodriguez*, as a matter of law the Hospital Defendants exercised professional judgment, guided by generally accepted standards in the medical community, in determining that Okunieff required involuntary commitment pursuant to MHL § 9.27.[4]

Compliance with the procedures of the MHL, a statute that neither forces nor encourages involuntary commitments, does not convert private action into state action. New York's involuntary commitment scheme puts in place due process safeguards for the protection of the person confronted with involuntary confinement—hence, the requirement of evaluations by more than one physician and the reminder to physicians that they consider alternate routes of treatment. The actual decision of whether commitment is warranted, however, is left entirely to the sound medical judgment of physicians. Therefore, the actions of the Hospital Defendants cannot be attribute to the State under a theory of state compulsion.

2. *Close Nexus/Joint Action*

The MHL does not create a sufficiently close nexus between the State and Hospital Defendants to mandate their

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[4] Peter Stastny, M.D., states in an Affidavit submitted by Okunieff that the determination of "dangerousness" requires a social, rather than a medical, assessment. Dr. Stastny's Affidavit is unhelpful in this summary judgment notion since, as the Second Circuit concluded in *Rodriguez*, the interpretation of the MHL—and the amount of discretion afforded to physicians—is a question of law and not fact.

classification as state actors. The fact that CPMC has a contract with the OMH that enables CPMC to operate a psychiatric wing and is licensed by the OMH Commissioner to serve as a primary psychiatric emergency care provider does not render the Hospital Defendants state actors. According to the Supreme Court, "the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed . . . do so." *Jackson*, 419 U.S. at 350 (citation omitted); *see Rockwell*, 26 F.3d at 258 (holding that private hospital and physicians who involuntarily committed plaintiff under Massachusetts state were not state actors, noting that state regulation, even if extensive, and receipt of federal funds do not establish state action); *Harvey*, 949 F.2d at 1132 (finding licensing and regulation insufficient to transform private hospitals into state actors for purposes of § 1983 liability). The purpose of the close nexus requirement is to "assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum*, 457 U.S. at 1004. This assurance is especially important where the plaintiff seeks to subject private parties to § 1983 liability by bestowing on them the title of state actors.

The instant case does not involve a situation where the state has " 'so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise.' "[5] *Harvey*, 949 F.2d at 1131 (quoting *NBC v. Communication Workers of Am., AFL-CIO*, 860 F.2d 1022, 1026 (11th Cir. 1988) (citation omitted)). The Eleventh Circuit in *Harvey*, confronting facts similar to the case at bar and the issue of whether involuntary commitment by private parties may be considered state action, found an insufficient nexus between the defendants, a private hospital and private

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[5] As described in the discussion of state complusion, the MHL leaves the decision to commit in the hands of the physician.

physicians, and the State. *See id.; see also Rockwell*, 26 F.3d at 258 (holding that Massachusetts statute did not create a sufficiently close nexus between private hospital and the State to warrant labeling private actors state actors). The court observed that "[b]oth the Supreme Court and our predecessor circuit have concluded that such a nexus is lacking in circumstances much more compelling than the circumstances in this case." *Id.* (referring to *Rendell-Baker* and *Blum*).

In *Rendell-Baker*, the Supreme Court examined the relationship between the State of Massachusetts and a private school in a § 1983 claim brought by discharged teachers. The private school, which taught special needs children, received 90% of its funds from the State and was extensively regulated in personnel matters by state-imposed guidelines. The Court refused to attribute the teachers' discharges to state action. *See Rendell-Baker*, 457 U.S. at 840-43. Similarly, the Supreme Court in *Blum* found that despite extensive state regulation and funding of private nursing homes, state action could not be maintained. *See Blum*, 457 U.S. at 1004.

Thus, because the MHL merely licenses private physicians and hospitals to commit involuntary commitments yet in no way influences the decisions to commit, its relationship with the Hospital Defendants is insufficient to pass the close nexus/joint action test.

2. *Public Function*

Involuntary commitment under the MHL fails the public function test because the powers exercised by the Hospital Defendants are not the sort that were "traditionally the exclusive prerogative of the State." *Jackson*, 419 U.S. at 353. This exclusion function theory is related to situations where the State delegates its responsibilities to private parties and then attempts to escape liability for constitutional violations caused by private parties acting pursuant to the delegation. *See Rockwell*, 26 F.3d at 258. This is not what New York State did in allowing physicians to decide whether involuntary commitment is in the best interests of a patient. The

responsibility for invalid commitment lies with the physician as a private individual. Very few activities are "exclusively reserved to the states." *Flagg Bros., Inc.*, 436 U.S. at 158-59; *see White v. Scrivner Corp.*, 594 F. 2d 140, 142 (5th Cir. 1979) (noting that even arrest, search, and detention are not exclusively reserved to states). Election is one such area. See *Flagg Bros., Inc.*, at 158. Involuntary commitment is not. *See Rockwell*, 26 F.3d at 258-60 (unwilling to categorize involuntary commitment in Massachusetts as a public function); *Harvey*, 949 F.2d at 1131 (same regarding Georgia statute).

According to Okunieff, the public function test is satisfied because involuntary commitment is a function of New York State in that New York authorizes confinement of the mentally ill. Okunieff, however, does not take the analysis far enough. As the Supreme Court declared in *Rendell-Baker*, "our holdings have made clear that the relevant question is not simply whether a private group is serving *a* 'public function.' We have held that the question is whether the function performed has been 'traditionally the exclusive prerogative of the State.' " 457 U.S. at 842 (quoting *Jackson*, 419 U.S. at 352 (emphasis added)); *see Rockwell*, 26 F.3d at 258 (finding that involuntary commitment is not a public function, and stating: "In order for a private actor to be deemed to have acted under color of state law, it is not enough to show that the private actor performed *a* public function. The plaintiff must show that the private entity assumed powers 'traditionally *exclusively* reserved to the State.' " (quoting *Jackson*, 419 U.S. at 352 (emphasis added)). The fact that the private party has powers coextensive with the state is irrelevant to determine that state action exists. *See Harvey*, 949 F.2d at 1131. Exclusivity is required.

Okunieff misstates *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), to support her contention that the exclusivity test required by the Supreme Court should not be followed. In *Edmonson*, the Court held that a private litigant in a civil case may not use preemptory challenges to challenges to exclude jurors on account of race. The Court found

that the action in question was the performance of a traditional governmental function due to that distinct nature of peremptory challenges. The Court stated that "the peremptory challenge has no utility outside the jury system, a system which the government *alone* administers." *Id.* at 622 (emphasis added). In addition, Okunieff's reliance on *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17 (2d Cir. 1979) to circumvent the exclusivity prong of the public function test is similarly misplaced. The case actually supports the use of "exclusivity". The Second Circuit in *Janusaitis* relied on *Flagg Bros., Inc.* and held that fire protection has traditionally been the exclusive function of the state and thus constitutes state action if performed by a private entity. *See id.* at 22. The court quoted *Flagg Bros., Inc.* when it stated the "[a]mong (such exclusive municipal functions) are such functions as education, fire and police protection, and tax collection." *Id.* (quoting *Flagg Bros., Inc.*, 436 U.S. at 163-64).

Two district court cases in New York have abandoned the exclusivity requirement to find that involuntary commitment is indeed a public function. *See Rubenstein v. Benedictine Hosp.*, 790 F. Supp. 396 (N.D.N.Y. 1992); *Ruffler v. Phelps Memorial Hosp.*, 453 F. Supp. 1062 (S.D.N.Y. 1978). The *Ruffler* court held that New York Hospital, a private hospital, had engaged in state action by involuntary confining plaintiff pursuant to the MHL. *See id.* at 1067-71. The *Ruffler* decision found that involuntary confinement was a public function in New York because of the legislature's assumption of responsibility for the mentally ill in § 7.01 of the MHL[6] and its extensive regulation of private agencies which provide mental health services. *See id.* at 1069. However, Ruffler concluded existence of state action on a theory that civil commitment is a matter of public concern without a finding of "exclusivity". This contention is contrary to the Supreme

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[6] MHL section 7.01 states: "The state of New York and its local governments have the responsibility for the prevention and early detection of mental illness and for the comprehensively planned care, treatment and rehabilitation of their mentally ill citizens."

Court's analyses in *Flagg Bros., Inc., Jackson, Rendell-Baker*, and *Blum*. The Eleventh Circuit criticized the Ruffler court because it "only inquired as to the public nature of the function and did not determine if exclusivity existed." *Harvey*, 949 F.2d at 1131 n. 10. In addition, contrary to *Ruffler*, extensive regulation does not make involuntary confinement an exclusive state function. In *Rendell-Baker*, plaintiffs asserted that the private school for maladjusted high school students performed a traditional public function because of extensive state regulation and funding. The Supreme Court disagreed, stating:

> Chapter 766 of the Massachusetts Acts of 1972 demonstrates that the State intends to provide services for such students at public expense. *That legislative choice in no way makes these services the exclusive province of the State.*

Rendell-Baker, 457 U.S. at 842 (emphasis added). Likewise, New York's authorization of civil commitment and assumption of care for the mentally ill under MHL § 7.01 do not convert involuntary commitment into a function traditionally reserved to the a state. Finally, *Ruffler* neglected the importance of the fact that the decision to commit Okunieff was based on medical judgment according to generally accepted medical standards, a fact the Supreme Court found crucial in Blum, as discussed above. For these reasons, *Ruffler* will not be followed.

Rubenstein is also unpersuasive as it relied heavily on *Ruffler*. In fact, the *Rubenstein* court recognized that *Ruffler* was criticized for not applying the "exclusivity" requirement in its public function analysis, but did not address why the requirement should not be followed. Rather, the court held that the activity of the private hospital in committing an individual was nonetheless reserved to the State under either its *parens patriae* or police power. *See Rubenstein*, 790 F. Supp. at 406. The court asked, "[i]f the State is not providing the authority to deny an individual his liberty what is providing

the authority?" *Id.* (quoting *Plain v. Flicker*, 645 F. Supp. 898, 905 (D.N.J. 1986). To answer the court's inquiry, the authority which private physicians and private hospitals use to commit an individual is the professional medical standard of the community where the physicians' medical judgments are based. The professional standard at which a physician is accountable is not established by the State.

The private physician is not exercising governmental authority when he or she uses medical judgment in assessing the dangerousness of an individual for commitment purposes. Similarly, when a physician prescribes medication, the physician is not exercising government authority but rather using medical judgment despite the fact that the physician is licensed by the State to prescribe medication. Authorization by the State does not constitute a public function. Failing to abide by the exclusivity requirement would create a slippery slope whereby private physicians who prescribe medication would be deemed state actors simply because the authority to license the physicians lies with the State.

In her quest to convert the Hospital Defendants into state actors, Okunieff proclaims that *Polk County v. Dodson*, 454 U.S. 312 (1981), and *West v. Atkins*, 487 U.S. 42 (1988), leave little doubt that the Hospital Defendants engaged in state action. Both cases, however, are distinguishable from the instant case as West involves prisoners, who are wards of the State, and *Dodson* involves state employees, not private individuals. The *Dodson* Court held that a public defender is not a state actor when defending indigent clients because he or she uses professional judgment in performing a lawyer's traditional function as counsel and takes an adversarial stance against the State. *See Dodson*, 454 U.S. at 318-20. *Dodson's* context is so far removed from the case at bar that it does not merit discussion.[7] West, on the other hand, does involve physicians. Okunieff's reliance on West, nonetheless, is mis-

[7] If anything, *Dodson's* analysis regarding the use of professional judgment may be used as an analogy to support the Hospital Defendants' assertion that there is no state action in this case.

placed because it was decided in the context of providing medical treatment to prisoners.

The Supreme Court held in *West* that a private physician under contract with the State to provide medical care to prisoners engaged in state action despite the fact that the challenged activity turned on medical judgments. The Court reasoned that the physician within the state prison performed a public function reserved to the State—providing medical care to prisoners. Unlike Plaintiff in the instant case, the prisoner in West was not free to consult a physician of his choosing. "[T]he only medical care West could receive for his injury was that provided by the State." *West*, 487 U.S. at 55. The State bore an affirmative, constitutional duty to provide medical treatment to those in custody. *See id.* at 56. Here, the State bears no duty to commit individuals involuntarily. The *West* Court realized that "although the provision of medical services is a function traditionally performed by private individuals, the context in which [these services were performed] for the State . . . distinguishes the relationship between [this physician] and *West* from the ordinary physician-patient relationship." *Id.* at 56 n. 15. The rationale behind the *West* decision lies in the fact that the prisoner relies entirely on prison authorities for medical treatment, and therefore health care in state prisons is the exclusive prerogative of the State. *See id.* at 55. The context in this case differs. It does not follow that because private physicians who are contracted by the State to provide medical care to prisoners, who are wards of the State, can be held as state actors, so too must private physicians who involuntarily commit citizens due to authorization by the State. Okunieff's assertion that just as the Eighth Amendment requires the State to provide adequate medical care to prisoners, the Fourteenth Amendment requires the State to provide minimally adequate care to mentally ill patients confined in institutions is inapposite to this case. It is not the care Okunieff may have received after commitment that is at issue but the decision by the Hospital Defendants to commit the Okunieff in the first instance.

A proper determination of whether an activity is a public function involves delving into the history of the activity. The circuit courts that have studied the history of involuntary commitment have concluded that such commitments have not traditionally been the exclusive prerogative of the State. *See Rockwell,* 26 F.3d at 258-60 (finding that history of involuntary commitment in Massachusetts reveals it is not a public function); *Spencer*, 864 F.2d at 1380-82 (same regarding involuntary commitment in Illinois). This inquiry, of course, is state specific. In the case at bar, history demonstrates that involuntary commitment has not been exclusively a function of New York State and thus is not a traditional public function.

In New York, involuntary treatment and confinement of the mentally ill originated in private homes, and later it took place in both private and public institutes. Since the beginning of the United States, families, friends, and guardians have cared for the mentally ill privately. *See* Henry M. Hurd *et. al.*, 1 *The Institutional Care of the Insane in the United States and Canada* 40 (Johns Hopkins Press 1916). According to Blackstone, writing in 1765, "[o]n the first attack of lunacy, or other occasional insanity, while there may be hope of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody under the direction of the nearest friends and relations." 1 *Commentaries on the Laws of England* 305. The New York Hospital, a private, not-for-profit hospital, was one of the first institutions to admit the mentally ill for in-patient care. The first patient was received in 1792. *See* Albert Deutsch, *The Mentally Ill in America* 97-98 (2d ed. 1949). In those days, "commitment could be effected with the greatest of ease. No specific safeguard existed for the protection of the personal liberty of the supposedly mentally ill person. The pauper and indigent insane might be summarily committed to the poorhouse, prison or hospital by friends or relatives or by order of public officials. . . ." *Id.* at 420

In New York, there seems to have been little early legislation in reference to the mentally ill, and if they were depen-

dent, they were probably classed among the poor. *See* Hurd, *supra*, at 86. "The violent and dangerously insane were handled under the authority of the sovereign's police powers." Samuel J. Brakel *et al.*, *The Mentally Disabled and the Law* 22 (3d ed. 1985). In 1838, private asylums, county poorhouses, public asylums and lunatic asylums of the City of New York were recognized by statute. *See* Hurd, *supra*, at 87. The care of the mentally ill, however, was not recognized as a public duty, except insofar as it sought to protect the public from violent persons. *See id.* Private institutional care predated public institutional care, as it was not until 1842 that laws were passed to erect the first state institution in New York. *See id.* The earliest movement toward complete state care did not come until the second half of the nineteenth century. *See* Deutsch, *supra*, at 234. In 1874, New York passed a law authorizing any asylum, public or private, institution, home, or retreat that cared for the mentally ill, without court order, to commit for five days any person upon the certificates of two physicians. 1874 N.Y. Laws ch. 446, § 1. *See Rockwell*, 26 F.3d at 259 (noting similar law passed in Massachusetts).

History reveals that involuntary commitment has long been a private remedy, although subject to safeguards, like repossession, self-defense, citizen's arrest, and other infringements on rights of liberty and property. *See Spencer*, 864 F.2d at 1380. Even if New York had been following the same procedure set forth in the current Mental Hygiene Law for the last 200 years, that would tend to show that

> Commitment had not been an exclusively public function, any more than transportation, or the removal of trespassers from one's property, or the repossession of goods from a defaulting debtor are exclusively public functions—that almost a century before the enactment of the Fourteenth Amendment, private persons were doing what [Plaintiff] contends is the work of the state today even when done by private persons,

id., such as the Hospital Defendants. That the State can authorize commitment through its *parens patriae* or police powers does not make it the exclusive prerogative of the State. The reasons for private commitment are practical. A person may need to be restrained immediately, by his or her family, physician, or even a stranger, and there may not be a public institution at hand. *See id.* at 1381. This is why the responsibility for treatment of the mentally ill is shared between private and public institutions. Simply because commitment today may only be effected in the manner prescribed by New York State does not prove that the power to commit has traditionally been the exclusive prerogative of New York, "Private commitment is no more state action than a citizen's arrest, the repossession of chattels, or the ejection of trespassers is." *Id.*

As this Court stated in *Thomas v. Beth Israel Hosp., Inc.*, as a general rule, private hospitals do not act under color of state law for § 1983 purposes. 710 F. Supp. 935, 940 (S.D.N.Y. 1989) (noting that private hospital was not acting under color of law when it complied with New York Child Protective Services Act by reporting suspected child abuse). The rule applies here. The application of the state compulsion, close nexus/joint action, and public function tests establish that the MHL, at most, provides a licensing provision enabling the private hospital to receive mental patients. Licensing and regulations are insufficient to transform the Hospital Defendants into state actors for § 1983 purposes. Holding otherwise would expose private physicians and private hospitals to section 1983 liability whenever they act pursuant to the MHL, despite the fact that their actions reflect medical judgments made according to generally accepted professional standards that are not established by New York State.

B. *Defendant Rosenberg Is Not a State Actor*

Defendant Rosenberg did not engage in state action when he authorized transport of Okunieff to CPMC for a psychiatric evaluation. Like the Hospital Defendants, Rosenberg is a private actor. Therefore the state compulsion, close nexus/joint

action, and public function tests are applicable. Their application mandates the same conclusions when applied as when applied to the Hospital Defendants: there was no state action. A test-by-test analysis, however, proves unnecessary because Rosenberg did not commit the act of which Okunieff complains. He was not among the physicians who committed Okunieff against her will pursuant to the MHL. His actions are one step removed from those of the Hospital Defendants. Rosenberg simply took steps necessary to secure a psychiatric examination of Okunieff. Okunieff's contention that Rosenberg should be deemed a state actor because it was his actions that set in motion the events that eventually led to her civil commitment cannot be sustained. Indeed, the Tenth Circuit in *Pino* dismissed a claim against a private therapist who advised police to transport the plaintiff to a hospital for psychiatric evaluation. See *Pino*, 75 F. 3d at 1466. The court reasoned that:

> [The therapist's] conduct does not rise to the level of state action merely because [the officers] responded to her call to the dispatcher and heeded her advice to transport Appellant to the hospital. Moreover, [the therapist], by her actions . . . did not exercise "some right or privilege" or act under a "rule of conduct" created by state law as required by *Lugar*.

Id. at 1465; *see Harvey*, 949 F. 2d at 1132 ("[P]rivate persons . . . who act pursuant to state statutes to commit the mentally ill cannot be held liable under section 1983.") Unlike civil commitment, ordering transport of Okunieff to the hospital for a psychiatric evaluation does not constitute a significant deprivation of liberty requiring due process protection. As the facts indicate, Okunieff was not subjected to four-point restraints during transport.

In deciding that Okunieff required a psychiatric evaluation Rosenberg relied not on statute but on pure medical judgment, thereby dispelling any notion of state compulsion. In addition, this function has never been within the exclusion function of

the State. In fact, one need not be a physician to facilitate a psychiatric evaluation of a person. A father, mother, sister, brother, husband, wife, or any person with whom the person alleged to be mentally ill resides could secure such an evaluation, *see* MHL § 9.27 (b), or request the person be taken into custody, if necessary, for the purposes of obtaining a psychiatric evaluation. *See Watkins v. Roche*, 529 F. Supp. 327, 329-30 (S.D. Ga. 1981) (finding that private physician's execution of certificate involuntarily subjecting plaintiff to psychiatric examination did not constitute state action because ordinary citizens had the same authority as the physician and the physician was not required or compelled by statute to execute the certificate). Thus, Okunieff's assertion that the law treats physicians differently than other citizens as physicians are authorized to make decisions that can result in involuntary commitment is misplaced.

It was found above that involuntary commitment itself does not convert a private actor into a state actor. *A fortiori*, actions taken by a private physician to set the ball rolling so that involuntary commitment might be a possibility certainly do not equal state action. Even if involuntary commitment were attributable to the State, requesting a psychiatric examination that ultimately leads to involuntary commitment surely cannot be. Holding otherwise would cast the net of § 1983 liability too far. A mother who brings her disturbed daughter to CPMC for psychiatric evaluation would be subject to § 1983 liability. Okunieff's claim is neither practical nor legally valid. A private physician does not trigger state action when he or she determines a patient is in need of immediate psychiatric evaluation and takes steps necessary to facilitate that evaluation.

Because Defendant Rosenberg is not an employee or agent of the State, his decision and actions constituted nothing more than treatment of a patient based only on medical judgment, and most importantly, he was not the physician who involuntarily committed Okunieff, Okunieff's § 1983 claim must fail for lack of state action.

III. *Okunieff's Pendent State Law Claims Will Be Dismissed*

A district court may decline supplemental jurisdiction when it dismisses all claims over which it has original jurisdiction. 28 U.S.C. § 1367 (c)(3). Since the parties are in an early state of the case and the federal claims have been dismissed, leaving no independent basis of jurisdiction over the remaining state claims, they will also be dismissed. *See Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994); *Modeste v. Local 1199*, 850 F. Supp. 1156, 1167 (S.D.N.Y. 1994), *aff'd*, 38 F.3d 626 (2d Cir. 1994).

Conclusion

In sum, Okunieff has failed to raise a genuine issue of material fact that the Hospital Defendants and Defendant Rosenberg's actions could be attributed to the State. For the reasons set forth above, Defendants' motions for summary judgment are granted, and all pendent state law claims are dismissed for lack of supplemental jurisdiction.

It is so ordered.

New York, N. Y.
May 7, 1998

ROBERT W. SWEET

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution provides in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Mental Hygiene Law Section 7.07 provides in relevant part:

(a) The office of mental health is charged with the responsibility for assuring the development of comprehensive plans, programs, and services in the areas of research, prevention, and care, treatment, rehabilitation, education, and training of the mentally ill.

New York Mental Hygiene Law Section 9.03 provides in relevant part:

Unless otherwise specifically provided for by statute, a mentally ill person shall be admitted to a hospital as an inpatient only pursuant to the provisions of this article.

New York Mental Hygiene Law § 9.27 provides in relevant part:

(a) The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission of such person. The examination may be conducted jointly but each examining physician shall execute a separate certificate.

(b) Such application must have been executed within ten days prior to such admission. It may be executed by any one of the following:

1. any person with whom the person alleged to be mentally ill resides.

2. the father or mother, husband or wife, brother or sister, or the child of any such person or the nearest available relative.

3. the committee of such person.

4. an officer of any public or well recognized charitable institution or agency or home in whose institution the person alleged to be mentally ill resides.

5. the director of community services or social services official, as defined in the social services law, of the city or county in which any such person may be.

6. the director of the hospital or of a general hospital, as defined in article twenty-eight of the public health law, in which the patient is hospitalized.

7. the director or person in charge of a facility providing care to alcoholics, or substance abusers or substance dependent persons.

8. the director of the division for youth, acting in accordance with the provisions of section five hundred nine of the executive law.

9. subject to the terms of any court order or any instrument executed pursuant to section three hundred eighty-four-a of the social services law, a social services official or authorized agency which has, pursuant to the social services law, care and custody or guardianship and custody of a child over the age of sixteen.

10. subject to the terms of any court order a person or entity having custody of a child pursuant to an order issued pursuant to section seven hundred fifty-six or one thousand

fifty-five of the family court act.

11. a qualified psychiatrist who is either supervising the treatment of or treating such person for a mental illness in a facility licensed or operated by the office of mental health.

(c) Such application shall contain a statement of the facts upon which the allegation of mental illness and need for care and treatment are based and shall be executed under penalty of perjury but shall not require the signature of a notary public thereon.

(d) Before an examining physician completes the certificate of examination of a person for involuntary care and treatment, he shall consider alternative forms of care and treatment that might be adequate to provide for the person's needs without requiring involuntary hospitalization. If the examining physician knows that the person he is examining for involuntary care and treatment has been under prior treatment, he shall, insofar as possible, consult with the physician or psychologist furnishing such prior treatment prior to completing his certificate.

(e) The director of the hospital where such person is brought shall cause such person to be examined forthwith by a physician who shall be a member of the psychiatric staff of such hospital other than the original examining physicians whose certificate or certificates accompanied the application and, if such person is found to be in need of involuntary care and treatment, he may be admitted thereto as a patient as herein provided.

New York Mental Hygiene Law § 31.02(a)(2) provides in relevant part:

(a) Except as provided in subdivision (b) of this section no provider of services shall engage in any of the following activities without an operating certificate issued by the commissioner pursuant to this article:

2. operation of any part of a general hospital for the purpose of providing residential or non-residential services for the mentally disabled.

New York Mental Hygiene Law § 31.04(a)(4) provides in relevant part:

(a) The commissioner shall have the power to adopt regulations to effectuate the provisions and purposes of this article, including, but not limited to the following:

4. establishing procedures for the issuance, amendment, and renewal of operating certificates, including temporary operating certificates, and for the suspension of revocation of operating certificates. Such procedures shall specify that no application for the issuance or renewal of an operating certificate for a hospital which is operated as part of a hospital as defined as defined in article twenty-eight of the public health law, shall be effective until such hospital is granted approval to admit patients in emergencies for immediate observation, care and treatment in accordance with section 9.39 or 9.40 of this chapter, provided that the commissioner shall waive this requirement for two year periods upon his determination that (i) there is no need for additional beds for emergency psychiatric admissions in the local geographic area, (ii) the hospital lacks the physical capacity to reasonably accommodate such emergency admissions without extensive structural changes, (iii) the hospital does not and reasonably could not provide the scope of service necessary to assure adequate and appropriate psychiatric care and treatment for patients in emergency situations, or (iv) the hospital has agreed to accept referrals of involuntary psychiatric patients under an emergency admissions system which has been approved by the commissioner.

(2)

No. 99-449

Supreme Court, U.S.
NOV 15 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RHODA OKUNIEFF,

Petitioner,

—v.—

ANNE SKOMOROSSKY, M.D., personally, LORRAINE INNES, M.D., personally, STAN ACROW, M.D., personally, ELIZABETH MIRABELLO, M.D., personally, JANE DOE, personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER and HERBERT PARDES, in His Official Capacity of Head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Respondents.

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

PATRICIA D'ALVIA
Counsel of Record
MARTIN, CLEARWATER & BELL
220 East 42nd Street
New York, New York 10017
(212) 697-3122

Attorneys for Respondents

3698

LIST OF PARTIES

The names of the parties in the proceeding in the Court whose judgment is sought to be reviewed are as follows:

Petitioner

Rhoda Okunieff

Respondents

Anne Skomorossky, M.D.
Lorrainer Innes, M.D.
Stan Arcow, M.D.
Elizabeth Mirabello, M.D.
Jane Doe
Columbia Presbyterian Medical Center
Herbert Pardes, In His Official Capacity as Head of the Department of Psychiatry of Columbia Presbyterian Medical Center

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 99-449

RHODA OKUNIEFF,

Petitioner,

against

ANNE SKOMOROSSKY, M.D., personally,
LORRAINE INNES, M.D., personally,
STAN ACROW, M.D. personally,
ELIZABETH MIRABELLO, M.D., personally,
JANE DOE, personally,
COLUMBIA PRESBYTERIAN MEDICAL CENTER
and HERBERT PARDES, in His Official Capacity of
Head of the Department of Psychiatry of
Columbia Presbyterian Medical Center,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondents respectfully request that Petitioner's request, for a writ of *certiorari* to review the judgment and opinion entered in this case by the United States Court of Appeals for the Second Circuit, be denied.

THE REASONS WHY THE WRIT SHOULD BE DENIED

I. THE OPINIONS BELOW ARE CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT

State Compulsion Test

Pursuant to Supreme Court Rule 10, this Court can consider whether a United States Court of Appeals has decided an important federal question in a way that conflicts with the relevant decisions of this Court, when determining whether to grant certiorari. To meet this standard, the plaintiff-petitioner claims that the private conduct of the defendants-respondents should be converted into state action because New York State "created the legal framework" governing civil commitment (p. 15, Petitioner's Brief) and because the defendants-respondents hospitalized Ms. Okunieff involuntarily pursuant to a state statute (New York Mental Hygiene Law §9.27). This is merely a distortion of the state compulsion test, misapplied, which requires proof that the state significantly encouraged or coerced the private party to act, so that the private party's actions were effectively those of the state. See *Ellison v. A.J. Garbarino, M.D.*, 48 F.3d 192 (6th Cir. 1995).

On the contrary, this Court has expressly found that under circumstances such as this case - where the sole criterion is private medical judgment - there is no such state coercion. See *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982); see also *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (decision to terminate a teacher was not state action because the decision was based on discretionary judgment,

independent of State influence). Although the Mental Hygiene Law provides the legal framework under which physicians may involuntarily hospitalize a patient by creating procedures and standards for commitment, what is critical is that the statute leaves the decision to hospitalize a patient to a physician's discretion. See *Blum v. Yaretsky*, *supra*; *Rendell-Baker v. Kohn*, *supra*.

In *Blum v. Yaretsky*, for example, private nursing home officials discontinued plaintiffs' Medicaid benefits because plaintiffs refused to be transferred to another health care facility. This Court found that New York State's social service regulations did not demonstrate that the State was responsible for the decision to discharge or transfer patients due to the discretion left to the private physicians. The decisions to transfer patients "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id.* 457 U.S. at 1008, 102 S.Ct. at 2788. Accordingly, this Court clearly held that the decision to transfer Medicaid patients to lower levels of care was not coerced by the State and did not constitute state action under 42 U.S.C. §1983, even though the entire Medicaid "legal framework", governing all aspects of the care, was pursuant to statute.

Like the New York State constitutional provision at issue in *Blum v. Yaretsky*, *supra*, New York Mental Hygiene Law §7.01 simply does not mandate the provision of any particular care. Moreover, as in *Blum*, the Mental Hygiene Law allows the private actor to use his or her discretion. Therefore, a finding that the defendant-respondents were not state actors when Ms. Okunieff was involuntarily hospitalized is consistent with established Supreme Court precedent.

Similarly, in *Rendell-Baker v. Kohn*, *supra*, this Court found that although a private school was generally subject to extensive state regulation and received extensive state funding, the regulations and funding did not influence the school's decision to terminate the plaintiff, a teacher at the school. The Court held that the decision to terminate the plaintiff-teacher did not constitute state action under 42 U.S.C.§1983 because the decision to terminate the teacher was merely defendants' private decision and the State had no role in it.

Plaintiff-petitioner's reliance on *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988), and *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) is unavailing, as *West* involved prisoners, who were wards of the state, and *Polk* involved state employees, not private individuals. Because of these distinctions, the holdings in these cases do not apply to the case at bar.

A true examination of *Polk County* reveals that this Court distinguished a public defender who is paid by the state from both an administrator of a hospital and a physician in a prison hospital. This Court held that because the public defender works under the same standards of competence as a private lawyer and uses professional judgment, the lawyer is not a state actor even if he is working on behalf of the state. The discussion in *Polk* regarding physicians' activities is limited to state employees, such as a prison physician and an administrator of a state hospital, and is therefore not material to the instant case. Certainly, *Polk* does not support plaintiff-petitioner's contention that the private defendant-respondents are state actors.

Similarly, plaintiff-petitioner's reliance on *West*, is misplaced, because it was decided in the context of providing

medical treatment to prisoners. This Court in, *West*, carved out the very narrow exception that a private party will be held a state actor for providing medical care to prisoners in custody. This is not inconsistent with defendant-respondents' argument herein. In *West*, this Court found that a private physician, who was under contract with the state to provide medical care to a prison inmate, was a state actor despite the fact that the physician's challenged activity turned upon medical judgments. This Court reasoned that the physician within the state prison performed a public function reserved to the state: to provide medical care to inmates. This Court recognized that "because West was a prisoner in 'close custody' he was not free to employ or elect to see a different physician of his own choosing." 487 U.S. at 51. This Court pointed out that "although the provision of medical services is a function traditionally performed by private individuals, the context in which respondent performs these services for the State...distinguishes the relationship between respondent and West from the ordinary physician-patient relationship". *Id.* at 56, n. 15.

The rationale behind the *West* decision is that an inmate must rely entirely on prison authorities for medical treatment and is, in fact, forbidden to seek medical attention elsewhere; therefore, in such cases, health care is the exclusive prerogative of the state which cannot be delegated to a private institution. *Id.* at 55; see also *Cunningham v. Southlake Center For Medical Health,* 924 F.2d 106, 109 (7th Cir.1991); *Sherlock v. Montefiore Medical Center*, 84 F.3d 522 (2d Cir. 1996).

Unlike a prisoner, a private citizen has numerous choices for health care, whether it be private or controlled by the state. Plaintiff-Petitioner's contention that Presbyterian Hospital serves as a catchment area for involuntary admissions

does not constitute state action because the private citizen is free to seek medical care elsewhere. The concept of a catchment area only speaks to a hospital's geographic location and not to the basis of the medical decisions made for a plaintiff's benefit.

It does not follow that because private physicians who are contracted to provide medical care to prisoners, who are wards of the state, can be held to be state actors, so too must private physicians who provide treatment to citizens who are not wards of the state. Otherwise, all private physicians' independent medical decisions would become actions attributable to the state. Instead, the defendants-respondents are similarly situated as the lawyers in *Polk* were, who exercised their professional judgment and were held to the standards of the canons of professional responsibility and the competence of other lawyers. In *Polk*, one would believe a public defender was a state actor being paid by the state, but in fact, this Court held that the public defender was not a state actor because the attorney relied on his own professional judgment.

Public Function Test

Contrary to plaintiff-petitioner's contentions, the Courts below did not misapply the public function test. Although plaintiff-petitioner contends that state action exists pursuant to the public function test, and that the decisions in the Courts below are inconsistent with the decisions previously rendered by this Court, the decisions in the Courts below are actually entirely consistent with the application of the public function test as previously applied by this Court.

In order to convert private action into state action under the public function test, it is not enough to show that the private actor performed a public function. The plaintiff must prove that the private entity assumed functions "traditionally *exclusively* reserved to the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 (1974) (emphasis added); see also *Rendell-Baker*, 457 U.S. at 842, 102 S.Ct. at 2770 ("[w]e have held that the question is whether the function performed has been 'traditionally the exclusive prerogative of the State.'" (emphasis in original, citing *Jackson, supra*). In *Flagg Brothers Inc., v. Brooks*, 436 U.S. 149, 158, 98 S.Ct. 1729, 1734, 56 L.Ed.2d 185 (1978) this Court restricted a broad interpretation of the public function test and stated that "[w]hile many functions have been traditionally performed by governments, very few have been exclusively reserved to the State." The fact that the private party is serving a "public function" is immaterial, and will not trigger 42 U.S.C. §1983 liability. *Rendell-Baker*, 457 U.S. at 842, 102 S.Ct. at 2772 (holding that education is a public function, but not the exclusive prerogative of the state).

History is extremely relevant regarding whether a given activity was an exclusive sovereign function. See *Rockwell v. Cape Cod Hospital*, 26 F.3d 254 (1st Cir. 1994); *Spencer v. Lee*, 864 F.2d 1376, 1380-81 (7th Cir. 1989) (historical analysis demonstrated that involuntary commitment was not a traditional public function). In the case at bar, history demonstrates that involuntary commitment has not been exclusively performed by the State of New York, and thus is not a traditional public function.

As Judge Sweet determined, involuntary treatment and confinement of the mentally ill in New York originated in private homes, and later took place in both private and public

institutes. Even today, both private and public institutions and individuals share responsibility for the involuntary confinement and treatment of the mentally ill. Families, friends and guardians have cared for the mentally ill privately since the beginning of the United States. Henry M. Hurd, *The Institutional Care of the Insane in the United States*, Vol. I, 27 (Johns Hopkins Press 1916) (hereafter "Hurd"). Mentally ill persons who had relatively well-to-do families or friends were usually cared for in their own homes. Albert Deutsch, *The Mentally Ill In America: A History of Their Care and Treatment From Colonial Times*, 40 (2d Ed. 1949) (hereinafter "Deutsch", JA 332-349). If violent or troublesome, mentally ill persons were locked up and chained by their families in strong-rooms, cellars, attics, and even outhouses.

New York State also was the home of the first private, for-profit, institutions to treat the mentally-ill in the United States. Hurd, *supra*. As of 1890, Sanford Hall on Long Island had been in operation for nearly half a century. Brigham Hall had been organized and opened in 1855 by Dr. George Cook in Canandaigua, New York. *Id.* Both institutions were under private ownership. *Id.*

In his decision, Judge Sweet specifically noted (26a-27a):

> Private institutional care predated public institutional care, as it was not until 1842 that laws were passed to erect the first state institution in New York [citation omitted]. The earliest movement toward complete state care did not come until the second half of the nineteenth century [citation omitted]. In 1874, New York passed a law authorizing any asylum, public or private, institution, home, or retreat

> that cared for the mentally ill, without court order, to commit for five days any person upon the certificates of two physicians [citation omitted].

Today, responsibility for the treatment and care of the mentally ill is shared between private and public institutions. Although New York State and its local governments have a responsibility for the care of mental illness, New York Mental Hygiene §7.01 (McKinney's Cons. Laws of NY, 1966), the Mental Hygiene Law permits private institutions to care for the mentally ill. See New York Mental Hygiene §9.01 *et seq.* These private institutions, such as Presbyterian Hospital, The New York Hospital, Mount Sinai Hospital and Gracie Square Hospital, play a pivotal role in providing involuntary care. See generally Lawrence C. Kolb, M.D. & H. Keith H. Brodie, M.D., *Modern Clinical Psychiatry*, (10th Ed. 1982) 151-52 (discussing the rise of short-term hospitalizations in the psychiatric services of general hospitals).

Thus, this Court should follow the Supreme Court decisions of *Blum* and *Rendell-Baker* and the recent decisions of several sister circuits, which considered whether involuntary commitment is an exclusive prerogative of the state, and held that it is not. See, e.g., *Rockwell*, 26 F.3d at 258-59; *Spencer v. Lee*, 864 F.2d at 1380-1381.

Nexus/Joint Action Test

Plaintiff-petitioner notes that Sections 31.02(a)(2), 31.04(a)(4) and 7.07 of the New York Mental Hygiene Law prohibit a hospital from operating a psychiatric ward unless it receives a certificate of operation from the State Office of

Mental Health, and that a private hospital must serve a catchment (*i.e.*, geographical) area for involuntary psychiatric admissions as a condition of renewal of an operating certificate. Plaintiff-petitioner argues that because these statutes require general hospitals to assume primary responsibility for emergency psychiatric admissions, an activity that the State would otherwise assume, the opinion below creates a situation in which mentally ill individuals lack a federal remedy where there has been a misuse of power because the hospital is "clothed with the authority of state law." *Lugar v. Edmonson Oil*, 457 U.S. 922, 929, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Citing *West v. Atkins*, 487 U.S. 42, 56, n.14, 108 S.Ct. 2250, 101 L.Ed.2d. 40 (1988), petitioner argues that the decision below "impermissibly enables" the state to contract out, or otherwise delegate, its constitutional responsibilities, while simultaneously depriving individuals of a constitutional remedy.

Although plaintiff-petitioner uses different terminology, she is essentially arguing that the Hospital and physicians should be deemed state actors under the joint action/nexus test. A private individual can be deemed a state actor when there is a sufficiently close nexus between the state and the challenged action of the private individual, so that the individual's action may be fairly attributed to the State. *Jackson v. Metropolitan Edison Co., supra.* This requirement ensures that constitutional standards are invoked only when the State is responsible for the specific conduct of which the plaintiff complains. *Blum v. Yaretsky, supra.* Actions of a private party satisfy the nexus test only when the state government jointly participates with the private party to deprive the plaintiff of her constitutional rights. *Harvey v. Harvey*, 949 F.2d 1127 (11th Cir. 1992).

The critical aspect to these cases is that for State action to exist, there must be a nexus between the State and the challenged action of the private party (i.e., a connection between the State and the *specific conduct* that is alleged to be State action). In the case at bar, the specific conduct is the involuntary hospitalization and treatment of Ms. Okunieff. The statutes and regulations to which the plaintiff-petitioner refers in her Petition (pp. 23-25) do not specifically relate to involuntary hospitalization or treatment. For example, the concept of a catchment area only speaks to a Hospital geographic location and not to the basis of the medical decisions made for plaintiff-petitioner's benefit. Therefore, the existence of these regulations cannot serve as a basis for finding state action in this case.

II. THERE IS NO CONFLICT AMONG THE FEDERAL COURTS

Pursuant to Supreme Court Rule 10, when determining whether to grant certiorari on an important federal question, this Court can consider whether a United States Courts of Appeals has entered a decision in conflict with the decisions of other United States Courts of Appeals. In this case, the Circuit Courts of the United States that have considered the issue have unanimously held precisely that civil commitment by private physicians does not constitute state action. See *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260 (4th Cir. 1998); *Pino v. Higgs*, 75 F.3d 1461 (10th Cir. 1996); *Ellison v. Garbarino*, 48 F.3d 192 (6th Cir. 1995); *Rockwell v. Cape Cod Hospital*, 26 F.3d 254 (1st Cir. 1994); *Harvey v. Harvey*, 949 F.2d 1127 (11th Cir. 1992); *Spencer v. Lee*, 864 F.2d 1376 (7th Cir. 1989); *Janicsko v. Pellman*, 774 F.Supp 331 (M..D. Pa. 1991), *aff'd w/o*

opinion, 970 F.2d 899 (3d Cir. 1992). Therefore, Judge Sweet's decision, affirmed by the Second Circuit, is consistent with the decisions rendered by other Courts of Appeals.

Although plaintiff-petitioner's counsel accurately notes that the decisions of the Courts of Appeals in these cases reversed a trend in which numerous District Courts had found that civil commitment by a private actor is state action, he incorrectly concludes that there is a lack of clarity in state action jurisprudence and that there is a need for "guidance." As seen by the cases cited *supra*, the Courts of Appeals have uniformly concluded that civil commitment does not constitute state action. To the extent these decisions conflict with some of the decisions rendered by the District Courts, it is respectfully submitted that the Circuit Courts have effectively reversed the decisions rendered by the District Courts and therefore have *already* clarified the law in this area such that there is no need for review by this Court.

Plaintiff-petitioner's references to decisions rendered by the State Courts, and her entreaty that this Court grant certiorari to resolve conflicts among them, are misplaced. One of the tests to determine whether state action exists is the public function test. Under this test, the private party must perform a function that is "traditionally the exclusive prerogative of the state." *Blum v. Yaretsky*, 457 U.S. 991, 1005, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 [1974]). History is extremely relevant regarding whether a given activity was an exclusive sovereign function. See *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S.Ct. 977, 988, 143 L.Ed.2d 130 (1999) (reviewing Pennsylvania's approach, historically, towards workers' compensation claims); *Rockwell v. Cape Cod Hospital*, 26 F.3d 254, 258-59 (1st Cir. 1994); *Spencer v. Lee*, 864 F.2d 1376,

1380-81 (7th Cir. 1989), *cert. denied* 494 US 1016, 110 S.Ct. 1317 (1990) (historical analysis has demonstrated that involuntary commitment was not a traditional public function); see also discussion, *infra*. The Courts which have applied this test, not only to the issue of civil commitment, but also to other private activities, have examined the legislative and social history of a given activity in relation to the State in which that activity took place. See, e.g. *Sullivan, supra*. Consequently, the historical analysis will differ from State to State. Judge Sweet recognized this in his decision (26a). The different conclusions drawn by some courts do not reflect a lack of clarity on state action jurisprudence, or the need for guidance, but rather, reflect the different historical circumstances among the States.

These diverse circumstances should not be disregarded, but respected. Each State should be able to rely on its own historical experience when determining whether a given activity meets the public function test. Therefore, a uniform rule from this Court is not necessary and would, in fact, abrogate the public function test.

III. PETITIONER HAS AN ADEQUATE STATE REMEDY AND A FUNDING OF STATE ACTION IS BOTH UNNECESSARY AND DETRIMENTAL

Private medical care issues - the heart of which is the professional medical judgment of physicians - are not regulated by the State and as such, are exclusively the province of medical malpractice and civil law. Absent control, joint action or the exercise of an exclusive public function by the State, there is no constitutional issue under 42 U.S.C. §1983.

Plaintiff-petitioner is attempting to create a constitutional issue out of a medical malpractice case. Breaches of the standard of care by private physicians, as alleged herein, do not constitute constitutional violations. As recognized by the Courts below, the defendants-respondents, private physicians and a private entity, are shielded from liability, under 42 U.S.C. §1983, because they are private individuals who exercised independent medical and psychiatric judgment which the law has held to be "private" conduct. As such, they are not state actors. If a patient believes he or she were hospitalized improperly, there is a remedy under state medical malpractice law. Constitutional constraints, therefore, are not required. To the contrary, such a finding would subject every medical judgment finding regarding involuntary admission (or a decision against admission) to federal court review. This would by-pass the structure already in place in State Courts and place an enormous unnecessary burden on the federal resources.

Contrary to petitioner-plaintiff's arguments, holding that civil commitment does not constitute state action would not permit mentally ill individuals to be hospitalized involuntarily without due process protection. These protections are incorporated into the New York Mental Hygiene Law, as this Law puts in place procedural due process safeguards for the benefit of those who may require temporary retention. Section 9.27 of New York's Mental Hygiene Law states:

(a) The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission for such person. The examination may be conducted

jointly but each examining physician shall execute a separate certificate.

New York Mental Hygiene Law, §9.27(a) (McKinney's 1996) (emphasis added).

Indeed, to justify involuntary hospitalization, this Court has held that due process requires that the state establish, by clear and convincing evidence, that the civil committee suffers from mental illness and poses a danger to herself or others. See *Addington v. Texas*, 441 U.S. 418, 431-32, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). This standard is incorporated into the New York Mental Hygiene Law and therefore the patient is afforded due process protection. See New York Mental Hygiene Law §9.39(a) (McKinney's 1996).

More importantly, Section 9.31 of the New York Mental Hygiene Law permits a patient to challenge her confinement and request a hearing on the propriety of the admission. Here, the plaintiff-petitioner actually invoked this provision of the statue to effectuate her release. Not only does the Mental Hygiene Law provide due process, but also, plaintiff-petitioner's own actions demonstrate that it works. Plaintiff-petitioner's arguments regarding the acts which the New York State Office of Mental Health might commit in the future have no bearing on the issue under consideration and, in essence, plaintiff-petitioner is asking for prospective relief.

It is respectfully submitted that the finding of state action in the context herein would deprive the private physicians and the Hospital of the protection inherently established by the Supreme Court cases and federal statutes which guard against the impermissible reach of federal law. See *Jackson v. Metropolitan Edison Co., supra*; *Community*

Medical Center v. Emergency Services of Northeastern Pennsylvania, Inc., 712 F.2d 878 (3d Cir. 1983). Moreover, the protection from 42 U.S.C. §1983 liability affords private physicians and the Hospital the freedom to perform their independent medical judgment without fearing the reach of the state.

By holding that the defendants-respondents are state actors, it is respectfully submitted that the Court would be holding that all private physicians' decisions made in private hospitals are actions attributable to the state. This is because all private hospitals, nursing homes and physicians are highly regulated by the state in all aspects of care, including the use of restraints, dealing with Medicaid protocols, health codes, etc. Such regulation, including state regulation alleged by plaintiff-petitioner herein, is not intended to expose the daily medical decisions of private physicians and private hospitals to the reach of federal law, but rather to provide protection to the individual patients.

Plaintiff-petitioner's fear, that individuals in New York who have suffered violations of their constitutional rights because they were involuntarily hospitalized will turn to State Courts to file 42 U.S.C. §1983 actions in the absence of a federal remedy, is unfounded. In *Snyder v. Albany Medical Center*, 206 A.D.2d 816, 615 N.Y.S.2d 139 (3d Dept. 1994), cited by plaintiff-petitioner in support of this proposition, the New York Appellate Division, Third Department, relied heavily upon the District Court decisions in *Rubenstein v. Benedictine Hosp.*, 790 F.Supp. 396 (N.D.N.Y. 1992) and *Ruffler v. Phelps Memorial Hospital*, 453 F.Supp. 1062 (S.D.N.Y. 1978). To the extent that these decisions were effectively overruled by the Second Circuit's decision in *Okunieff v. Rosenberg*, 166 F.3d 507 (2d Cir. 1999), the

decision in *Snyder* would no longer be reliable and therefore would not serve as a basis for forum shopping. Although the decision, in *Okunieff,* is not binding on the New York State Courts, it is certainly persuasive authority, particularly when it undermines the federal decisions on which the state decision is based. See *People v. Kin Kan*, 78 N.Y.2d 54, 574 N.E.2d 1042, 571 N.Y.S.2d 436 (1991), *reargument denied* 78 N.Y.2d 1008, 580 N.E.2d 1061, 547 N.Y.S.2d 458 (1991).

Plaintiff-petitioner argues (Brief, pp. 13-14) that granting her petition for certiorari would permit this Court to address "the role of the State when an individual suffers a deprivation of rights" because to date, when addressing the state action issue, this Court has only examined the role of the government when an individual sought constitutional protection for the receipt of services. Plaintiff-petitioner fails to recognize, however, that the only issue that would be decided by this Court is whether the private defendants are, in fact, state actors (p. 13). The next question - whether there has been a constitutional violation - is not before this Court. Furthermore, the issue of whether there was substantive Due Process violation was not the subject of the decision rendered in the Courts below, and therefore plaintiff-petitioner's references to the Due Process Clause are inapposite.

Plaintiff-Petitioner's attempt to draw a distinction between the role of the State, when an individual suffers a deprivation of rights, and the role of the government, when an individual seeks constitutional protection for the receipt of services, and her attempt to characterize this Court's prior decisions as falling exclusively in the latter category (Brief, p. 13) are illusory. As this Court noted in *Sullivan, supra*:

> [Respondents argument] ignores our repeated insistence that state action requires both an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,' and that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'

Sullivan, *supra*, 119 S.Ct. at 985 (emphasis added) (citations omitted).

Clearly, then, the issue of state action has been considered in the context of an alleged deprivation of constitutional rights.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of *certiorari*.

Dated: New York, New York
November 12, 1999

Respectfully submitted,

PATRICIA D'ALVIA
Counsel of Record

MARTIN, CLEARWATER & BELL
220 East 42nd Street
New York, New York 10017
Tel. No.: (212) 697-3122
Counsel for Respondents

Of Counsel:
Gregory J. Radomisli
Peter T. Crean

No. 99-449 (3)

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IN THE

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RHODA OKUNIEFF,

Petitioner,

—v.—

ANNE SKOMOROSSKY, M.D., Personally, LORRAINE INNES, M.D., Personally, STAN ARCOW, M.D., Personally, ELIZABETH MIRABELLO, M.D., Personally, JANE DOE, Personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER, HERBERT PARDES, in his official capacity as head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FOR THE NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY; MENTAL HEALTH ASSOCIATION IN NEW YORK STATE, INC.; MENTAL HYGIENE LEGAL SERVICE, FIRST, SECOND, AND THIRD JUDICIAL DEPARTMENTS, NEW YORK STATE; DISABILITY ADVOCATES, INC.; NEW YORK ASSOCIATION OF PSYCHIATRIC REHABILITATION SERVICES; MENTAL HEALTH EMPOWERMENT PROJECT, INC.; NEW YORK LAWYERS FOR THE PUBLIC INTEREST, INC.; AND CENTER FOR PUBLIC REPRESENTATION

MARVIN BERNSTEIN
Mental Hygiene Legal Service
First Judicial Department
60 Madison Avenue
New York, New York 10010
(212) 779-1734

PETER MARGULIES
(Counsel of Record)
St. Thomas University School of Law
16400 N.W. 32nd Avenue
Miami, Florida 33054
(305) 623-2324

(*Counsel continued on inside front cover*)

26pp

SIDNEY HIRSCHFELD
DENNIS FELD
Mental Hygiene Legal Service
Second Judicial Department
170 Old Country Road
Mineola, New York 11501
(516) 746-4545

CLIFFORD ZUCKER
Disability Advocates, Inc.
5 Clinton Square
Albany, New York 12207
(518) 432-7861

JOHN GRESHAM
MARIANNE ENGELMAN LADO
New York Lawyers
for the Public Interest
151 W. 30th Street
New York, New York 10001-4007
(212) 244-4664

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Prospective *amici* respectfully move this Court for permission to file the accompanying brief *Amicus Curiae* in support of Petitioner. Consent has been sought from the parties. Petitioner has consented to submission of this brief. In September, counsel of record for prospective amici contacted counsel for respondents, who indicated that she would decline to consent. Leave of this Court is therefore requested under Rule 37.2(b).

The interest of amici is set forth in the brief. The accompanying brief addresses issues of fact and law pertaining to the involuntary commitment by private hospitals pursuant to state law. Amici provide historical background to demonstrate that civil commitment historically has been an integral component of the state's exercise of the police power. This level of state involvement justifies accountability for private hospitals under 42 U.S.C. § 1983 for wrongful involuntary commitment of individuals. The brief also provides background information on instances of abuses in involuntary commitment by private hospitals, also justifying the need for a remedy under 42 U.S.C. § 1983. Amici believe that their brief will supplement rather than repeat arguments made by the Petitioner.

/s/ PETER MARGULIES
PETER MARGULIES
(Counsel of Record)
St. Thomas University School of Law
16400 N.W. 32nd Avenue
Miami, Florida 33054
(305) 623-2324

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INTEREST OF THE *AMICI*

National Association for Rights Protection and Advocacy

The National Association for Rights Protection and Advocacy (NARPA) is incorporated under the laws of the State of Michigan. It was founded in 1979 and has approximately 1200 members nationwide. Its membership includes recipients of mental health and developmental disabilities services; lay, professional and self-advocates; family members; service providers; disability rights lawyers; administrators; and teachers at schools of law, social work and public policy. NARPA is dedicated to promoting policies and pursuing strategies to people who have been labeled as mentally disabled. It seeks to promote rights and empowerment in housing, employment, income maintenance and treatment services. To that end, NARPA sponsors an annual advocacy conference; publishes a quarterly newsletter; provides technical assistance to a variety of advocacy organizations, government agencies, and consumer caucuses; provides testimony and information to legislative bodies; and participates as amicus in litigation related to its mission of equality under law.

Mental Health Association of New York State, Inc.

The Mental Health Association of New York State, Inc. ("MHANYS") can trace its advocacy roots back to the 19th century. MHANYS presently is comprised of 34 affiliate Mental Health Associations across New York. A notforprofit corporation, MHANYS is made up of advocates, providers and consumer so services within the mental health system. MHANYS provides training, technical assistance, selfhelp and advocacy at all levels of government, working to ensure available and accessible mental health services for all New Yorkers.

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* Pursuant to U.S.S.C. Rule 37.6, counsel of record hereby certifies that he received no assistance from counsel for any party in this case in the writing of this brief.

Mental Hygiene Legal Service, First Judicial Department, New York State

The Mental Hygiene Legal Service (MHLS) is empowered under the New York Mental Hygiene Law to represent persons with mental disabilities in institutions and in judicial proceedings related to their disability. It represents individuals in commitment proceedings brought by both public and private hospitals under the Mental Hygiene Law and the Criminal Procedure law. It also represents individuals in guardianship proceedings, and conducts class action litigation to improve institutional conditions and community placements for persons with mental disabilities. The MHLS, First Judicial Department, represents persons with mental disabilities under such circumstances in New York County (Manhattan) and Bronx County, two areas with a very high concentration of private hospitals. The MHLS is participating in this case because it believes that institutions that confine persons against their will in violation of law should be equally accountable, whether such institutions are public or private.

Mental Hygiene Legal Service, Second Judicial Department, New York State

The MHLS, Second Judicial Department, like its sister agency in the First Department, is a New York State agency statutorily mandated to provide legal assistance to persons admitted to both public and private facilities licensed and/or operated by the New York State Office of Mental Health. It represents persons with mental disabilities in Duchess, Kings, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk and Westchester Counties. The MHLS Second Department is participating in this case because it believes that, in New York State, psychiatric commitment is an exclusive duty of the State based upon its police and parens patriae powers and therefore, private entities that are licensed and regulated for purposes of carrying out this public charge should be accountable under 42 U.S.C. § 1983.

Mental Hygiene Legal Service, Third Judicial Department, New York State

The Mental Hygiene Legal Service, Third Judicial Department, plays the same broad advocacy and representational role as its sister MHLS agencies. It represents thousands of persons with mental disabilities in court proceedings in private, non-profit, and governmental hospitals in upstate New York, including Albany and Schenectady counties.

Disability Advocates, Inc.

Disability Advocates, Inc. (DAI) is a notfor profit protection and advocacy organization, which, since 1989, has provided free legal advocacy for persons with disabilities. DAI has been instrumental in establishing the rights of persons with disabilities in New York, having represented disabled individuals in *Matter of St. Luke's-Roosevelt Hospital Center, Marie H., City of New York, State of New York*, 89 N.Y.2d 889 (1996) (which established the right to counsel for at public expense for indigent allegedly incapable individuals in guardianship proceedings), *T.D. v. New York State Office of Mental Health*, 650 N.Y.S.2d 173, (1st Dept. 1996), *appeal dismissed*, 91 N.Y.2d 860 (1997) (which invalidated Office of Mental Health regulations which permitted risky nontherapeutic experiments on incapable psychiatric patients), *Chirico v. Office of Vocational and Educational Services for Individuals with Disabilities (VESID)*, 211 A.D.2d 258 (3d Dept. 1995) (which held that the state vocational rehabilitation agency must provide services to disabled individuals to eliminate unnecessary pain and hardship caused by working), *Trautz v. Weisman*, 819 F.Supp. 282 (S.D.N.Y. 1993) (which held that disabled residents of adult care facilities have a remedy under the Racketeer Influenced and Corrupt Organizations Act against the operators of adult care facilities), and many other cases enforcing the rights of persons with disabilities under the American Disabilities Act and other civil rights legislation.

The New York Association of Psychiatric Rehabilitation Services

The New York Association of Psychiatric Rehabilitation Services ("NYAPRS") is a statewide coalition of New Yorkers who are in recovery from a mental illness, and the professionals who work with them. Founded in 1981, NYAPRS also acts as the New York State chapter of the International Association of Psychosocial Rehabilitation Services. Through its member organizations, NYAPRS serves over 15,000 individuals who currently receive rehabilitation services. A priority of the organization is strengthening the rights of individuals recovering from mental illness in both inpatient and community settings. NYAPRS thus strongly supports the availability of relief under 42 U.S.C. § 1983 for persons who are deprived of their constitutional rights.

Mental Health Empowerment Project, Inc.

The objective of the Mental Health Empowerment Project, Inc., a nonprofit organization based in Albany, New York, is to maximize the freedom, independence and recovery of clients in the mental health system. It has helped start and works closely with over 500 selfhelp and advocacy groups and approximately 30 nonprofit corporations run solely by mental health consumers. Some of the clients served by Mental Health Empowerment Project are subject to unlawful confinement by private psychiatric facilities and thus have a strong and personal interest in ensuring the right be free from unconstitutional confinement, and to enforce that right under 42 USC section 1983.

New York Lawyers for the Public Interest, Inc.

New York Lawyers for the Public Interest, Inc. ("NYLPI") is a nonprofit public interest law office founded in 1977. NYLPI attorneys practice in the areas of disability rights, health law and environmental justice. Under contracts with the New York State Commission on Quality of Care for the

Mentally Disabled, NYLPI operates four federally authorized Protection and Advocacy programs in New York City, thereby serving people with a wide range of disabilities, physical and mental; these include Protection and Advocacy for Individuals with Developmental Disabilities, Protection and Advocacy for Individuals with Mental Illness, and Protection and Advocacy of Individual Rights. NYLPI has substantial relevant expertise as a result of the fact that it handles a broad array of matters on behalf of patients and residents of psychiatric facilities and residences for the developmentally disabled, and represents individuals with disabilities on a wide array of issues.

Center for Public Representation

The Center for Public Representation, based in Northampton, Massachusetts, is a national advocacy organization that represents people with mental illness in civil commitment proceedings, institutional reform litigation, and related matters. The Center is funded by the federal government to provide protection and advocacy services for people with mental illness in Massachusetts. Since nearly all acute mental hospital admissions in Massachusetts are to private facilities and because the majority of admissions are involuntary, most of the Center's clients are individuals who have at one time or another been involuntarily admitted to a private psychiatric facility. These individuals have an interest in enjoying the same rights to redress for wrongful commitments as those persons committed to governmental facilities.

SUMMARY OF THE ARGUMENT

Involuntary commitments by private hospitals are an integral element of the states' exercise of their authority to protect the public under the police power. Civil commitment confines an individual against her will for a significant period of time because the committing institution believes that the individual poses a threat to self or others. In guarding against

this threat, state law, policy, and practice assign a key role to civil commitment by private hospitals. This integral role in the state's exercise of its police power distinguishes involuntary commitments by private hospitals from other, incidental deprivations of liberty by private actors, such as the temporary detention of shoplifters pending arrival of police officers. As with any form of confinement integral to the exercise of the police power, including confinement in privately operated jails, accountability under 42 U.S.C. § 1983 is central to vindication of constitutional rights.

History confirms the integral role of private involuntary commitment in the exercise of the police power. Before this Court applied constitutional protections to the commitment process, procedural abuses in private involuntary commitments tracked the manifold abuses in state institutions that impelled federal judicial intervention. Far from demonstrating, as the courts below asserted in the instant case, any functional separation between state and private involuntary commitment, this joint history of overreaching demonstrates the integral relationship of state and private confinement of individuals pursuant to the police power. Indeed, history reveals that since the early 1800's, states and private facilities have collaborated closely on exercising the police power through involuntary commitment.

Factors that obscure professional judgment in the for-profit private sector enhance the need for constitutional accountability under 42 U.S.C. § 1983 for involuntary private commitment. Aggressive marketing, bed-filling practices, and outright fraud spurred by the need for insurance dollars have muted the exercise of professional judgment in private, for-profit involuntary commitments. The fourteenth amendment does not authorize holding liberty interests hostage in the hunt for profits. Accountability under 42 U.S.C. § 1983 for private hospital abuses of the commitment process simply evens the scales of justice.

ARGUMENT

I. THE INTEGRAL RELATIONSHIP OF CIVIL COMMITMENT TO THE STATE'S EXERCISE OF POLICE AND PARENS PATRIAE POWER DEMONSTRATES THAT CIVIL COMMITMENT IS STATE ACTION.

This Court has recognized repeatedly that civil commitment is a "significant deprivation of liberty," *see Jones v. United States*, 463 U.S. 354, 361 (1983), justified only by the state's exercise of its police and parens patriae powers. *See O'Connor v. Donaldson*, 442 U.S. 563 (1975). Due process, this Court held, required that states tailor civil commitment to the state's police and parens patriae powers by predicating civil commitment on an express finding that the individual subject to commitment was dangerous to herself or others. *See O'Connor v. Donaldson*, 442 U.S. 563 (1975). Because of its integral relationship to the state's police and parens patriae powers, civil commitment constitutes state action whether it is performed by the state directly or by private institutions acting as the state's delegates.

A. History Reveals That Civil Commitment Has Always Been an Exclusive Function of the State or Its Delegates

Courts have found in the early history of the states a warrant for viewing civil commitment as state action. As a definitive New York Court of Appeals decision noted, from the early history of New York "detention [of "idiots" and "the insane"] was sanctioned under the police power of the state on account of the necessity of protecting them and the public from their disordered minds and insane acts." *See Sporza v. German Savings Bank*, 84 N.E. 406, 408 (N.Y. 1908). In explaining its holding, the court observed that,

> Jurisdiction is inherent in the state over unfortunate persons within its limits who are idiots or have been deprived of the use of their mental faculties. It is its duty to protect the community from the acts of those persons who are not under the guidance of reason, and also to protect them, their persons and their property from their own disordered and insane acts. In England, whence our law respecting idiots and lunatics is derived, the custody and care of such persons and their property are part of the prerogative of the sovereign . . . On our separation from Great Britain . . . the king's prerogative . . . was vested in the people of the state . . .

Id. The *Sporza* Court's analysis confirms that all institutions that detained individuals under this prerogative of the state acted as the state's delegates.

In holding otherwise in the instant case, the courts below forgot Tocqueville's injunction to base historical judgments "not on any single reason, but upon the mass of evidence." *See* Alexis de Tocqueville, *Democracy in America* 38 (Richard D. Heffner ed., 1956). The courts below failed to cite to *Sporza* or consider its view that civil commitment is authorized only by the state's power or the delegation of the state's power to private actors. In addition, the courts below failed to consider the other ample historical evidence of the integration of governmental and private commitment efforts. *See* David Rothman, *The Discovery of the Asylum: Social Order And Disorder in the New Republic* 266, 277-81 (1971) (detailing collaboration of governmental and private actors in commitment process). Instead, the courts below relied on two factors: private actors' historical participation in civil commitment and the extreme informality of the commitment process. Taken in context, however, both of these factors support petitioner's view of private commitment as the delegated exercise of state police power.

In the instant case, the district court, affirmed per curiam by the Court of Appeals, made much of the fact that in New York, involuntary confinement of the mentally ill originated in private homes. *Okunieff v. Rosenberg*, 996 F. Supp. 343, 355 (S.D.N.Y. 1998) (citing Henry M. Hurd et al., 1 The Institutional Care of the Insane in the United States and Canada 40, Johns Hopkins Press, 1916). The *Sporza* Court's analysis demonstrates, however, that the involvement of private actors is entirely consistent with an integrated scheme involving both the direct exercise and delegation of state police power. *Sporza* notes that it was "common practice for the relatives and next of kin of persons who had become insane, if violent, to restrain them and place them in some retreat or institution for their care and medical treatment." *Sporza v. German Savings Bank*, 84 N.E. at 408. The *Sporza* Court notes, however, that the remedy for such restraint always has been one reserved for excesses of *state power*: "The writ of habeas corpus was always available to inquire into the cause of such detention and to release such persons in case they were found sane." *Id.*

The district court also relied on the historical informality of the civil commitment process as evidence that commitment was not an exclusively public function. *See Okunieff v. Rosenberg*, 996 F. Supp. 343, 355-56 (S.D.N.Y. 1998). Here, too, the court's analysis is correct as far as it goes. What is missing from the court's analysis is a recognition that informality in civil commitment was a central element of the exercise of the state's police power to promote the detention of persons labeled as mentally ill.

Today, after this Court's recognition of the constitutional dimensions of commitment in landmark cases such as *Addington v. Texas*, 441 U.S. 418, 425 (1979) and *O'Connor v. Donaldson*, 442 U.S. 563, 580 (1975) (Burger, C.J., concurring), civil commitment procedures have a formal cast that befits the liberty interests at stake. These procedural requirements, such as *Addington*'s holding that continued civil com-

mitment requires proof by clear and convincing evidence, indisputably govern both state and private commitments today. If, historically, the state had subjected itself to procedural requirements in the civil commitment arena, but had permitted private actors to operate free of such constraints, the district court would have had a clear basis for its view that commitment was not a public function. However, the legal landscape in the early days of the republic was quite different.

In the early days of the republic, which the district court uses as a historical guide, informality was the rule in civil commitment for both public and private agencies. No safeguards attached to commitment ordered by either state or private agencies until the second quarter of the nineteenth century. For both governmental and private agencies, record-keeping regarding such involuntary confinements of individuals was the only requirement. *See* Adam J. Falk, Note, *Sex Offenders, Mental Illness, and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment After Kansas v. Hendricks*, 25 Am. J. L. & Med. 117, 123 n.60 (1999), *citing Paul S. Appelbaum, Almost a Revolution: Mental Health Law and the Limits of Change* 20 (1994).

The district court in the instant case failed to address the consequences that acknowledgment of this informal legal landscape yield for its public function analysis. Since procedural requirements did not then attach to the commitment process, the absence of differentiation between governmental and private actors in civil commitment does not resolve the public function issue. Far from conclusively demonstrating that civil commitment was not a public function, the historical evidence, confirmed by the New York Court of Appeals view in *Sporza v. German Savings Bank*, 84 N.E. at 408, suggests more readily that governmental and private committing agencies were close collaborators using the informality of civil commitment to promote public goals of maintenance of order and safety.

Also absent from the district court's analysis is any consideration of the historic costs of the unchecked deprivations of liberty wrought by civil commitment. The focus of involuntary commitment was the segregation of persons labeled as mentally ill. *See Omstead v. L.C.*, 119 S. Ct. 2176, 2181 (1999) (describing historic segregation of persons with disabilities in institutions); *cf.* Rothman, *supra*, at 137 ("The first postulate of the asylum program was the prompt removal of the insane from the community.") "As soon as the first symptom of the [mental] disease appeared, the patient had to enter a mental hospital," *id.*, with no requirement of a formal commitment proceeding. Eventually, the asylums took on more of a custodial function than a rehabilitative function. Rothman, *supra*, at 238. The inspection of asylums was substandard, and institutions became "hotbeds of neglect and cruelty," *Id.* at 269.

As American law moves beyond this history of institutional segregation, accountability under section 1983 should follow suit. Indeed, the error of the courts below in the instant case may reside principally in their selection of the wrong historical period to be examined to determine whether civil commitment is an exclusively public function. After *O'Connor v. Donaldson*, 442 U.S. 563 (1975), which held that an individual could be committed only upon a finding of dangerousness to self or others, the state's police power became the only constitutionally permissible basis for civil commitment. After *O'Connor*, therefore, civil commitment became one element of the state's provision of "police protection" to its citizens. Under this Court's decision in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), "police protection" is a core public function. *Id.* at 163-64. Pre-*O'Connor* history, including the early days of the Republic relied on by the courts below, is irrelevant for state action purposes. Since *O'Connor*, civil commitment has fit squarely into the police protection paradigm identified in *Flagg Bros* as a core public function. As a component of this core public function, civil

commitment since *O'Connor* clearly constitutes state action. As the "private prison" case demonstrates, the state's delegation of its police power to private parties does not dissolve the remedies for constitutional violations embodied in section 1983. *See West v. Atkins*, 487 U.S. 42 (1988). Remedies for deprivations of liberty and due process in civil commitment should hinge not on such delegation, but on the function of civil commitment as a crucial component of the state's police power.

B. Comparison To Other Forms Of Self-Help Remedies That Are Not Subject To 42 U.S.C. § 1983 Trivializes the Liberty Interests at Stake in Civil Commitment.

Misleading comparisons regarding the public function served by civil commitment extend beyond the realm of history. Many courts erroneously compare civil commitment by private parties to instances in which private parties deprive an individual of liberty or property without being subject to section 1983 scrutiny. *See Spencer v. Lee*, 864 F.2d 1376, 1381 (7th Cir. 1989); *Okunieff*, 996 F. Supp. at 356. However, the type of deprivation of liberty involved in civil commitment distinguishes it from the often-cited examples of detaining shoplifters, *White v. Scrivener Corp.*, 594 F.2d 140 (5th Cir. 1979), or repossession of property, *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978). Such comparisons fail to take into account that a physician "is not simply availing himself of a 'self-help' remedy with the acquiescence of the state; instead the function he performs is more akin to the state's power and duty to protect against threats to the general public and to care for those unable to care for themselves." *Willacy v. Lewis*, 598 F. Supp. 346, 349 (D.D.C. 1984); *see also Kay v. Benson*, 472 F. Supp. 850, 851 (D.N.H. 1979) ("Th[e] power of detention is the type normally and historically exercised by the sovereign states and other governmental entities.")

A closer look at repossession and detention of shoplifters reinforces this point. Repossession of chattels involves depri-

vation of a property interest, not a liberty interest. Furthermore, repossession is a remedy designed to protect the property interests of a vendor or lender. Civil commitment, in contrast, which contemplates confinement of a person deemed to pose a danger to self or others, is an exercise of the state's police power. *See O'Connor v. Donaldson*, 442 U.S. 563 (1975). Detention of shoplifters is also a remedy designed to uphold shopowner's property interests. Detention of shoplifters is brief, bounded by the arrival of police officers or the shopowner's ejection of the offending party. Consequently, both the overlap with the police power and the abridgment of liberty interests are incidental in nature. In contrast, when private hospitals commit a person against her will, they confine her for a sustained period of time—thirteen days, in the instant case, JA-404-405—in order to protect the patient and/or the public from danger. This situation is analogous to detention of accused criminals, delinquent children, or aliens that clearly constitutes state action. *Cf. West v. Atkins*, 487 U.S. 42 (1988) (stating that private physicians under contract with the State to provide medical care to prisoners engaged in state action despite the fact that the challenged activity turned on medical judgments).

II. ACCOUNTABILITY UNDER 42 U.S.C. § 1983 FOR WRONGFUL COMMITMENT BY PRIVATE FACILITIES IS A NECESSARY CHECK ON COMMITMENTS DRIVEN BY PECUNIARY INTEREST, NOT PROFESSIONAL JUDGMENT.

A section 1983 remedy for wrongful private commitments serves the same salutary purpose as relief for wrongful deprivations of liberty in other contexts: it promotes compliance with the rule of law. *See* Steven J. Schwartz, *Damage Actions as a Strategy for Enhancing the Quality of Care of Persons With Mental Disabilities*, 17 N.Y.U. Rev. L. & Soc. Change 651, 685-86 (1990) (discussing the potential of institutional self-imposed remedial measures if the prospect of liability for damages exists). The excesses and abuses evident in the his-

tory of civil commitment demonstrate the importance of such incentives for lawful behavior by committing authorities. *See* Donald Hermann, *Barriers to Providing Effective Treatment: A Critique of Procedural, Substantive, and Dispositional Criteria In Involuntary Civil Commitment*, 39 Vand. L. Rev. 83 (1986) ("While the development of procedural rights raises obstacles to the imposition of effective treatment, this development, on the whole, has been desirable."). In the private (and particularly private for-profit) hospital setting,[1] accountability under section 1983 is a crucial antidote to the noxious influence that monetary concerns exert on professional judgment.

Congress, state legislatures, and commentators have all expressed grave concern about the adverse effect of private hospitals' pecuniary interests on the professional integrity of their admissions and treatment decisions. High fixed costs place a premium on filling beds in hospitals. A Boston Globe review of State Department of Mental Health records found several Massachusetts hospitals determined to keep their hospital beds filled, regardless of the patient's condition. *Flawed Law Turns Patients into Prisoners*, The Boston Globe, Wednesday, May 12, 1997, at 10; *cf.* Lois A. Weithorn, Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 Stan. L. Rev. 773, 813 (1988) ("The fact that these facilities' profits increase when beds are filled raises serious doubts about the ability of their staffs to function as 'neutral factfinders' "); Mary K. Eamon, *Institutionalizing Children and Adolescents in Private Psychiatric Hospitals*, 39 Soc. Work 588, 592 (1994) ("for-profit hospitals have also been criticized for using aggressive mar-

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[1] Respondent in the instant case is a non-profit institution. This alone, however, does not counsel against section 1983 accountability. First, this Court must consider the entire range of institutions and individuals affected when it rules. Second, states are non-profit entities, yet it is undisputed that a state psychiatric facility is subject to liability for wrongful commitments under section 1983.

keting techniques aimed more at filling their beds than providing services that may be in the best interests of their patients").[2] The pursuit of reimbursement dollars supplied by psychiatric admissions may help account for the increased civil commitment by private hospitals. *Cf.* John Petrila, *Redefining Mental Health Law*, 16 Law & Human Behav. 89, 91 (1992) (noting increase in private commitment rates).

The United States Congress has found troubling evidence that financial pressures have led to substantial abuses in private psychiatric admissions. In 1992, a Committee of the United States House of Representatives investigated the practices of private psychiatric hospitals in the United States. The committee found thousands of adolescents, children and adults hospitalized for psychiatric treatment that was unnecessary and unjustified. Lynn Payer, *Disease-Mongers: How Doctors, Drug Companies, and Insurers Are Making You Feel Sick*, John Wiley & Sons, Inc. 234-35 (1992). After further investigation the committee uncovered an array of egregious practices by private hospitals. Private hospitals held patients against their will until their health benefits expired; pressured staff psychiatrists to boost admissions to increase profits; and even funneled kickbacks to school counselors for committing students. *Id.*; *cf.* Kelli Schmidt, *Who Are You to Say What My Best Interest Is*, 71 Wash. L. Rev. 1187, 1211 (1996); *citing How Inpatient Psychiatric Treatment Bilks the System and Betrays Our Trust: Hearings Before the House Select Comm. On Children, Youth, and Families*, 102d Cong., 2d Sess. (1992).

Abuses in one major chain of private psychiatric hospitals—Charter Behavioral Health Systems—illustrate how economic pressures adversely affect patients. State regulators in New Hampshire forced Charter to close the adolescent unit of their Nashua, New Hampshire facility, citing a failure to rem-

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[2] On the cost pressures which for-profit hospitals face, see Arnold S. Relman, *Investor-Owned Hospitals and Health-Care Costs*, 309 N. Eng. J. Med. 370 (1983).

edy abusive and unsafe practices, including "untrained staff, unsanitary conditions, improper use of restrains, record-keeping violations and sexual abuse of teen-agers and children." *See* Barry Meier, *Midas Touch Was Billionaire's Gift to Bush*, N.Y. Times, Oct. 30, 1999, at A1, A11 (discussing regulatory investigations of Charter Behavioral Systems, which is owned by a friend and business associate of the governor of Texas). The federal Health Care Financing Administration (HCFA) demanded changes in Charter hospitals in Massachusetts that had used restraints improperly in cases involving 9- and 10-year-old children. See Dolores Kong, *US Cuts Funds to for-profit chain; Health officials cite inadequate documentation concerns*, Boston Globe, Sept. 1, 1999, B6; cf. *Update*, Modern Healthcare, Sept. 27, 1999, at 24 (reporting that HCFA had given Charter Systems until Feb. 14, 2000 to remedy deficiencies). These investigations stemmed from a report on the CBS News program "60 Minutes II" that uncovered substantial evidence of improper psychiatric admissions and other abuses in Charter Systems facilities. See Kong, *supra*. Accountability under sec. 1983 for wrongful civil commitments can play a healthy role in discouraging such abuses.

III. ALLOWING PRIVATE HOSPITALS TO PERFORM INVOLUNTARY COMMITMENTS WITHOUT ACCOUNTABILITY UNDER § 1983 WOULD CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF STATE AUTHORITY.

The pecuniary interests distorting private hospital admissions also defeat the reliance of the courts below on the "professional judgment" of physicians as a neutral, bounded basis for confining people against their will. Without section 1983 accountability, private hospitals have a massive grant of authority from the state to confine people against their will, but no meaningful standard for exercise of that authority except the successful pursuit of bodies for filling beds. New York's Mental Hygiene Law, § 7.01 states, in pertinent part:

"*The state of New York and its local government[s]*" have the responsibility for the prevention and early detection of mental illness and for the comprehensively planned care, treatment, and rehabilitation of their mentally ill citizens." N.Y. MENTAL HYGIENE LAW § 7.01 (McKinney 1998) (emphasis added). New York State and other states choose to make private institutions an integral part of the plan for meeting this goal. States delegate responsibility, including the responsibility for involuntary commitment, to private institutions. However, such a delegation should not defeat accountability under § 1983.

Preserving accountability under § 1983 is particularly crucial because an individual's confinement in a private as opposed to government hospital is often a product of fortuity. Commitments to private, rather than public facilities frequently occur simply because a police officer deems transporting the individual to a private facility to be more convenient. *Cf.* N.Y. Mental Hygiene Law § 9.41 (1998) (setting out authority of police officers in emergency commitments). Accountability under § 1983 should not hinge on such happenstance. Citizens victimized by private institutions through wrongful involuntary commitments like the 13-day confinement endured by petitioner in the instant case should have the same recourse against delegates of the state that citizens possess when governmental officials directly abuse the police power.

CONCLUSION

Allowing the state to continuously delegate its power to private physicians and hospitals without any recourse or responsibility is a grave danger in any constitutional system. Deprivation of liberty, involuntary commitment of perfectly healthy individuals, and insurance fraud are among the consequences of this delegation without responsibility. Remedying these consequences requires recognition of a simple,

time-honored principle: ongoing deprivations of liberty integral to state exercise of the police power, such as those wrought by civil commitment, constitute state action. Based on the foregoing points and authorities, amici respectfully request that this Court grant *certiorari* to resolve the error applied by the Southern District of New York and the Second Circuit.

Dated: Miami, Florida
November 9, 1999

Respectfully submitted,

PETER MARGULIES[3]
(Counsel of Record)
St. Thomas University School of Law
16400 N.W. 32nd Avenue
Miami, Florida 33054
(305) 623-2324

MARVIN BERNSTEIN
Mental Hygiene Legal Service
First Judicial Department
60 Madison Avenue
New York, New York 10010
(212) 779-1734

SIDNEY HIRSCHFELD
DENNIS FELD
Mental Hygiene Legal Service
Second Judicial Department
170 Old Country Road
Mineola, New York 11501
(516) 746-4545

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CLIFFORD ZUCKER
Disability Advocates, Inc.
5 Clinton Square
Albany, New York 12207
(518) 432-7861

JOHN GRESHAM
MARIANNE ENGELMAN LADO
New York Lawyers for
the Public Interest
151 W. 30th Street
New York, New York 10001-4007
(212) 244-4664

(4)

No. 99-449

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IN THE

Supreme Court of the United States

RHODA OKUNIEFF,

Petitioner,

—against—

ANNE SKOMOROSSKY, M.D., personally, LORRAINE INNES, M.D., personally, STAN ARCOW, M.D., personally, ELIZABETH MIRABELLO, M.D., personally, JANE DOE, personally, COLUMBIA PRESBYTERIAN MEDICAL CENTER, HERBERT PARDES, in his official capacity of head of the Department of Psychiatry of Columbia Presbyterian Medical Center,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI*

WILLIAM M. BROOKS
(*Counsel of Record*)
Mental Disability Law Clinic
Attorney for Petitioner
Touro Law Center
300 Nassau Road
Huntington, New York 11743
(516) 421-2244 ext. 331

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PRELIMINARY STATEMENT

The respondents' Brief in Opposition is particularly noteworthy in that the respondents do not challenge the petitioner's contention that the decision that civil commitment is not state action threatens to deprive many mentally ill individuals of constitutional safeguards generally thought to be

inherent in the civil commitment process. In failing to challenge this contention, the respondents also fail to take issue with the assertion that the trend toward privatization has resulted in significant increases in the number of allegedly mentally ill individuals who are subject to involuntary hospitalizations at private hospitals.

It is also significant that while the respondents assert that civil commitment does not satisfy the public function test, the respondents fail to address the distinction between the performance of a function that both the government and the private sector may undertake, *see, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (provision of utility services), and the exercise of an exclusive state prerogative that the state has delegated to the private sector. *See* Petition for Writ of *Certiorari* at 17-20. The failure of a number of courts to even address, much less recognize, this distinction, *see Rockwell v. Cape Cod Hospital*, 26 F. 3d 254, 259-60 (1st Cir. 1994); *Spencer v. Lee*, 864 F. 2d 1376, 1380-81 (7th Cir. 1989) (en banc), illustrates the need for guidance by this Court.[1]

Rather, the respondents argue, *inter alia,* that the granting of *certiorari* is not warranted because (1) the opinions of the courts below are not inconsistent with prior decisions of this Court because civil commitment does not satisfy any of the state action tests and (2) there is no conflict among the circuit courts. However, the absence of a conflict among the courts of appeals, in and of itself, hardly warrants a denial of *certiorari*. In almost every case involving the constitutional rights of institutionalized mentally disabled individuals pertaining to their confinement in which this Court granted *certiorari*, there was no conflict among the circuits. *See Jackson v. Indiana,* 406 U.S. 715 (1972); *O'Connor v. Donaldson,* 422

[1] This Court's resolution of the state action issue with election cases conclusively demonstrates that a private entity can perform a function that is an exclusive prerogative of the state and such action remains state action. *See Smith v. Allwright*, 321 U.S. 649, 663 (1944).

U.S. 563 (1975); *Addington v. Texas*, 441 U.S. 418 (1979); *Parham v. J.R.*, 442 U.S. 584 (1979); *Jones v. United States*, 463 U.S. 354 (1983); *Allen v. Illinois*, 478 U.S. 364 (1986); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Heller v. Doe by Doe*, 509 U.S. 312 (1993). As in those cases, the issues presented by the petitioners are important and deserve plenary review by this Court.

This brief will first establish that the underpinnings of the circuit court decisions are extremely weak, which warrants scrutiny of this issues by this Court. This brief will then establish that the existence of possible claims under state law for a wrongfully confined mentally ill individual does not render § 1983 claims superfluous.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THE CIRCUIT COURTS ARE OF QUESTIONABLE AUTHORITY AS TO REQUIRE A RESOLUTION OF THE ISSUE AT HAND BY THIS COURT.

The respondents err when they assert that the uniformity of decisions by the circuit courts on the issue at hand warrants a denial of *certiorari*. Upon scrutiny, the decisions of the circuit courts that have concluded that the Constitution does not protect against erroneous commitments to private psychiatric hospitals because such commitments are not state action have failed to consider significant state action jurisprudence of this Court. Moreover, wrongful psychiatric commitment is a "horrendous consequence." *Goetz v. Crosson*, 967 F. 2d 29, 39 (2d Cir. 1992) (Newman, J. concurring). Hence, particularly because of the significant individual interests at stake, this Court should conclusively resolve this question.

First, none of these circuit court opinions that have addressed the issue at hand examined the relevance of private physicians having the authority to commit only because state

law provided the mantle of authority. *See National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 191 (1988); *West v. Atkins*, 487 U.S. 42, 49 (1988); *Griffin v. Maryland*, 378 U.S. 130, 135 (1963). Likewise, with the exception of the court in *Ellison v. Garbarino*, 48 F. 3d 192 (6th Cir. 1995), none of the courts addressed how this Court's state action analysis in *West v. Atkins* impacts on the issue at hand.

Moreover, the court in *Ellison* clearly misinterpreted this Court's decision in *West*. The court in *Ellison* held that *West v. Atkins* did not control because the physician in *West* was contractually bound to the state to provide medical services to prisoners in state custody. 48 F. 3d at 196-197. This interpretation of *West* was clearly wrong. This Court in *West* expressly held state action existed not because of the contractual relationship between the doctor and the State but because of the authority conferred upon the physician to satisfy the State's constitutional mission to provide medical care to those in custody. 487 U.S. at 55.

Finally, the public function analysis by a number of circuit courts is highly questionable. Not only did the courts fail to distinguish between the performance of a public function and the delegation of an exclusive governmental prerogative, *see supra* at 2, but by looking at historical practices in a particular state, *see Rockwell v. Cape Cod Hospital*, 26 F. 3d at 259; *Spencer v. Lee*, 864 F. 2d at 1380, circuit courts ignored this Court's directive to avoid using historical practices of one state to determine a defendant's state action status:

> To rely upon the historical antecedents of a particular practice would result in the constitutional condemnation in one State of a remedy found perfectly permissible in another.

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 162-63 (1978).

II. THE AVAILABILITY OF STATE LAW REMEDIES DOES NOT RENDER § 1983 CLAIMS UNNECESSARY.

Contrary to the assertion of the respondents, the availability of causes of action under state law does not render § 1983 claims unnecessary. First, § 1988 authorizes the provision of attorneys fees in § 1983 actions. Because some mentally ill individuals do not suffer substantial measurable damages as a result of wrongful hospitalization, which may limit the willingness of the private bar to represent aggrieved individuals, the availability of attorneys' fees in civil rights actions pursuant to 42 U.S.C. § 1988 may make the difference between a wrongfully confined person obtaining counsel and not obtaining counsel. *See* Brooks, *Reevaluating Substantive Due Process as a Source of Protection for Psychiatric Patients to Refuse Drugs*, 31 Indiana L. Rev. 937, 941-42 (1998). This is particularly important because Congress has recognized that many mentally ill individuals suffer violations of their rights when they are confined and should have access to the courts. *See* Senate Report No 99-109, 1986 U.S. Code Cong. and Adm. News, pp. 1368, 1376.

Second, the limitations period governing state law claims may well be shorter than the limitations period governing § 1983 actions. *See* Brooks, *supra* at 941, n.33. Third, while § 1983 actions are not subject under state law to condition precedents to filing lawsuits, such as a notice of claim provision, *see Felder v. Casey*, 487 U.S. 131, 145 (1988); *Gordon v. Higgs*, 716 F. Supp. 1351, 1352 (D. Nev. 1989) (state malpractice screening law did not govern § 1983 medical treatment claim by prisoner), state law claims may be subject to such provisions. *See Bailey v. Woel*, 485 A. 2d 265, 268 (Md. 1984) (dismissal of claim warranted when plaintiff fails to present evidence before a medical malpractice arbitration panel). Because many mentally ill individuals may lack the faculties to deal with the procedural intricacies of litigation, *cf. United States ex rel. Morgan v. Sielaff*, 546 F. 2d 218, 222

(7th Cir. 1976), the existence of condition precedents under state laws may mean the difference between a successful and unsuccessful lawsuit, particularly if aggrieved individuals are unrepresented because § 1983 compensated counsel are unavailable.

Finally, state courts may have more restrictive rules governing such matters as class actions, preliminary injunctions and discovery. *Cf.* Schwartz & Kirklin, *Section 1983 Litigation: Claims and Defenses*, § 1.18 (3 ed. 1997). This may render it more difficult to eliminate systemic abuses that exist in private psychiatric hospitals.

For numerous reasons, the respondents also err when they assert that because private hospitals are subject to extensive government regulation, a determination that they are state actors would result in a holding that all decisions made by physicians in private hospitals are attributable to the state. State regulation does not convert private medical decisions to state action. *See Blum v. Yaretsky*, 457 U.S. 991, 993 (1982). Rather, it is the coercive use of the states' police and *parens patriae* powers that warrant a determination that civil commitment to a private hospital is state action. *See* Petition for *Certiorari* at 14-19.[2] Moreover, a finding that private physicians become state actors when they involuntarily hospitalize a mentally ill person will not convert them into state actors in all situations since a party may be a state actor for some purposes, but not others. *See Sherlock v. Montefiore Medical Center*, 84 F. 3d 522, 527 (2d Cir. 1996).

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[2] Indeed, it is unlikely that the Constitution governs a consensual doctor-patient relationship in any context. *See DeShaney v. Winnebago County*, 489 U.S. 189, 199-200 (1989) (only "when the State takes a person into its custody and holds him there against his will, [does] the Constitution impose upon it a corresponding duty to assume some responsibility for his safety and well-being"); *Suffolk Parents of Handicapped Adults v. Wingate*, 101 F. 3d 818, 823-24 (2d Cir. 1996) (no constitutional obligations to provide services to institutionalized mentally disabled individuals because they were not involuntarily institutionalized).

Finally, the respondents argue that the second prong of any state action question—whether or not there has been a violation of a constitutional right—is not before this Court. The courts below did not address this question because they concluded that state action did not exist because the actions of the respondents were not attributable to the state. *See* Petition for Writ of *Certiorari* at 11a. Any court addressing this question would have little difficulty concluding that the Constitution prohibits the involuntary confinement of a nondangerous individual. *See, e.g., O'Connor v. Donaldson*, 422 U.S. at 576; *Project Release v. Prevost*, 722 F. 2d 960, 971-72 (2d Cir. 1983).

CONCLUSION

For the reasons given in this brief and the Petition for *Certiorari*, this Court should grant this petition for *certiorari*.

Dated: Huntington, New York
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WILLIAM M. BROOKS
(Counsel of Record)
Mental Disability Law Clinic
Attorney for Petitioner
Touro Law Center
300 Nassau Road
Huntington, New York 11743
(516) 421-2244 ext. 331